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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1924—NOS. 199, 200 and 201.

AUSTIN NICHOLS & COMPANY, EUG. SANCHEZ and JOSE GILDE SAGREDO, co-partners trading as E. Sanchez & Company, and E. TOLIBIA & COMPANY,

Petitioners,

—against—

Steamship "ISLA DE PANAY"; COMPANIA TRASATLANTICA,

Claimant-Respondent.

REPLY BRIEF FOR PETITIONERS.

T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Petitioners.

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REPLY BRIEF FOR PETITIONERS.

The Claimant-Respondent Introduced the Letters of Guarantee Not Merely for Purposes of Indentification But as Exhibits.

The claimant-respondent, on page 69 of its brief says:

> "On page 59 [of the petitioners' brief] it is said that the letters of guarantee were offered in evidence by the ship. This is not true. They were simply marked for identification" (p. 148, fol. 266).

On page 209 of the Record, Jose Benjumea, the

claimant-respondent's agent, in the commission issued to Seville, was asked by counsel for the claimant-respondent the following question:

> "If you state that you demanded letters of guarantee from the consignors, please state whether Claimant's Exhibits 13, 14 and 15 for Identification, which are shown to you by the Commissioner, are the letters of guarantee which you received from said consignors, and if so, have them marked as exhibits by the Commissioner and attached to your answer."

Benjumea answered as follows (Record, p. 210):

> "I ordered the acceptance of the letters of guarantee mentioned in this question and numbered 13-14-15 in claimant's exhibit submitted for identification which were shown to me by the Commissioner and identified by me in accordance with my answers and marked Exhibits Numbers 2-3-4."

The three letters of guarantee are printed on pages 220 and 221 of the Record and show on their faces that they were marked as exhibits by the American Consul: "Exhibit No. 2—Robert Harnden, Consul of the U. S. of America" (Record, p. 220); "Exhibit No. 3—Robert Harnden, Consul of the U. S. of America" (Record, p. 221); "Exhibit No. 4—Robert Harnden, Consul of the U. S. of America" (Record, p. 221). The commission to which these exhibits were attached was signed by "Robert Harnden, Consul of the U. S. of America" (Record, p. 215). This commission and the exhibits were returned by the American Consul and filed on March 18, 1922 (Record, p. 1).

Benjumea, the Claimant-Respondent's Agent at Seville Had Authority to Issue Bills of Lading Binding the Isla de Panay.

At pages 55 and 56 of its brief the claimant-respondent says:

> "In their statement of facts at page 4 and, in fact, throughout their brief, the petitioners refer to Jose Benjumea of Seville, Spain, as the agent of the steamship *Isla de Panay*. Benjumea was not the agent of the *Isla de Panay* but the agent of the Compania Trasatlantica at Seville. * * * The appointment of a certain person as the representative of the Compania Trasatlantica at Seville did not *ipso facto* constitute him the agent of all of that company's vessels, in whatever trade engaged."

At page 208 of the Record, Jose Benjumea testified:

> "I was acting in the capacity of agent of the Compania Trasatlantica through the power of attorney, copy of which is annexed hereto and marked Exhibit No. 1."

At page 210 of the Record Jose Benjumea testified that "the shipping notes for New York were sent to *THIS AGENCY FOR THE S. S. ISLA DE PANAY*." This specific admission by Benjumea that he was an agent "for the S. S. *Isla de Panay*" was made on direct examination by counsel for the claimant-respondent. Even without this admission the claimant-respondent's own evidence shows that Jose Benjumea was the agent of the *Isla de Panay*. The bill of lading which

was introduced by claimant as its Exhibit No. 2 (Record, p. 215) recites "shipped on board the Spanish steamer *Isla de Panay*" and counsel for the claimant-respondent admits, at page 58 of his brief, that "the captain's name was affixed thereto (to the bills of lading) by the Company's agent with a rubber stamp," and at page 38 of his brief, that "the guarantees were delivered to the claimant-respondent's agent at Seville in return for the bills of lading." Moreover, Benjumea testified that "I issued the bills of lading only" (Record, p. 214). Furthermore, counsel for the claimant-respondent did not at any time question the authority of Jose Benjumea to act as agent for the *Isla de Panay* until he filed his brief in this court.

But aside from these considerations, the answer alleges, "that the bills of lading for the carriage of the said merchandise hereinabove referred to contained, among others, the following provisions, terms and stipulations, subject to which the carriage was expressly made" (Record, pp. 4, 10, 16). The answer sets forth the terms of the bills of lading at some length. In paragraph 9 of the answer (Record, pp. 6, 12, 18, 19) it is alleged that the bill of lading was a contract between the *Isla de Panay* and the petitioners and that the *Isla de Panay* performed all of the duties laid upon it under the bills of lading. The bills of lading were introduced in evidence by the claimant at the trial as "Claimant's Exhibit 2" (Record, p. 215). Under these circumstances, no argument is necessary to show that the claimant by its pleadings and by its own evidence has adopted the contract and has ratified the agency

of Benjumea when he issued these bills of lading on behalf of the steamship *Isla de Panay.*

At page 60 of its brief, the claimant-respondent admits that "the bills of lading which were dated on or about October 27, 1917, were delivered about November 5, 1917, at which time the cargo had left Seville," and at page 38 of its brief, the claimant-respondent says: "The guarantees were delivered to the claimant-respondent's agent at Seville in return for the bills of lading." The guarantees were dated November 5th and 8th, 1917 (Record, pp. 220 and 221). The casks were loaded on board the *Isla de Panay* "day and night" on November 4th and 5th, 1917 (Record, p. 81). She sailed from Cadiz with the casks on board at 5 P. M. on November 5, 1917 (Record, pp. 81, 98). Therefore, at the time that Jose Benjumea issued and delivered the bills of lading to the shippers, the petitioners' shipments were on board the *Isla de Panay.* No other bills of lading covering petitioners' shipments were issued by the Captain or any other agent of the *Isla de Panay* or of the claimant-respondent. The bills of lading issued by Jose Benjumea recited "shipped on board the Spanish steamer *Isla de Panay*" (Record, p. 215). There is nothing on the faces of the bills of lading to indicate to anyone that the bills of lading were other than the ordinary ship's bills of lading of the *Isla de Panay.* The rubber stamp signatures, affixed to the bills of lading by Jose Benjumea, read as follows:

"The Captain. A. Pastrana."

"The Agent of the steamer (round stamp) Compania Trasatlantica, Seville Agency"

(Record, p. 218; see particularly the photostat copy of the bill of lading between pp. 214 and 215 of the Record).

The Issues as Defined in Claimant-Respondent's Brief.

A reading of the four points made by the claimant-respondent in its brief discloses that they really state only two defenses (1) the bill of lading clause excepting liability for breakage and the third section of the Harter Act excepting liability for "insufficiency of package"; and (2) that this Court should overrule the decision in the *Higgins* case, 248 Fed. 386, that the ship is estopped from relying on insufficiency of package. As the second point is conditioned on the first, the petitioners should recover if either point is not sustained.

POINT I.

The bill of lading exception of breakage, and the Harter Act exception of insufficiency of package, which counsel for the claimant relies upon in his brief as an excuse for failure to perform, is of no avail, because "underlying the whole contract of affreightment there is an implied condition upon the operation of the usual exceptions from liability—viz., that the shipowners have" used ordinary skill and prudence in accepting the shipment, and have not accepted goods known to be unfit for carriage and deliberately concealed that fact from the consignee.

In *Atlantic Shipping & Trading Co.* v. *Louis Dreyfus Co.*, Law Reports (1922), 2 Appeal Cases, 250, 260, House of Lords, Lord Sumner, delivering judgment, said:

> "Underlying the whole contract of affreightment there is an implied condition upon the operation of the usual exceptions from liability—namely, that the shipowners shall have provided a seaworthy ship. If they have, the exceptions apply and relieve them; if they have not, and damage results in consequence of the unseaworthiness, the exceptions are construed as not being applicable for the shipowners' protection in such a case."

Lord Sumner further said:

> "In *Tattersall* v. *National Steamship Co.* (12 Q. B. D. 297), the words 'under no circumstances shall they be held liable for more than £5 for each of the animals' were held inapplicable to protect the shipowners from liability for the full value of animals lost by the ship's unseaworthiness, in spite of the apparently unrestricted generality of the words 'under no circumstances,' and in spite of the fact that they recognized liability up to £5 a head, and did not purport to exclude it altogether. That such words do not avail, where loss is due to unseaworthiness, was virtually recognized in *Baxter's Leather Co.* v. *Royal Steam Packet Co.* ((1908) 2 K. B. 626, 632) and held in *Wiener & Co.* v. *Wilsons, &c., Line* ((1910) 15 Com. Cas. 294)."

In *Tattersall* v. *The National Steamship Company, Limited* (1884), 12 Q. B. D., 300, 302 (Smith and Day, *JJ.*) Smith, *J.*, said:

> "I am of the same opinion. The real

question is what is the true meaning of a very special bill of lading relating to the carriage of certain cattle and other animals; and whether under that bill of lading the plaintiff can recover more than £5 damages in respect of each animal. It is admitted that the damage was occasioned by the negligence of the shipowner's servants before the voyage commenced in not properly cleansing and disinfecting the ship. There is unquestionably a duty on the part of the shipowner to have the ship reasonably fit for the carriage of the goods. The case of *Steel* v. *State Line Steamship Co.* conclusively so decides. Is there then anything in this bill of lading to exempt the defendants from what would *prima facie* be their liability in respect of the breach of this duty? I do not think there is. The terms of the bill of lading which have been alluded to appear to me to deal with the contract so far as it relates to the carriage of the goods upon the voyage; they do not in my opinion relate to anything before the commencement of the voyage. It was urged by the counsel for the defendants that the mention of 'stevedores' in the bill of lading shewed that the acts of servants of the defendants previous to the voyage were contemplated by the bill of lading. Now the stevedore no doubt is a landsman, but the reason why he is mentioned in this bill of lading obviously is because the mode of stowage of the cargo may very often be the cause of the damage which subsequently arises from sea perils during the voyage. I do not think that the mention of 'stevedores' as persons for whose negligence the defendants are not to be liable in any way advances the contention for the defendants. It seems to me that the true construction of the bill of

> lading is this: as the animals are going to be in the charge of the shipper's servants during the voyage it is agreed that the shipowners shall not be responsible for accidents, disease, or mortality; but it is not denied that this must mean, except accidents, disease or mortality occasioned by the negligence of the defendants' servants. Then it is further stipulated on behalf of the shipowners that 'under no circumstances' shall they be liable to a greater extent than £5 for each of the animals. I take the meaning of the whole to be that they are not to be liable for accidents, disease, or mortality arising during the voyage, unless occasioned by the negligence of their servants, and that even in respect of accidents, disease, or mortality so occasioned, they shall only be liable to the amount of £5. So construed the stipulation in no way restricts or affects the primary obligation of the shipowner to have the ship reasonably fit to receive the goods. On these grounds I agree that the judgment should be for the plaintiff."

Day, *J.*, delivered a concurring judgment.

Insofar as its relation to the bill of lading exceptions is concerned, the implied warranty of seaworthiness referred to in *Atlantic Shipping & Trading Co.* v. *Louis Dreyfus Co.* (*supra*) and in *Tattersall* v. *The National Steamship Company, Limited* (*supra*) is identical with the duty which this Court recognized in *Hannibal Railroad* v. *Swift*, 79 U. S. 262, 272, that "if objection existed on any of these grounds ['to the manner in which the property was packed'] or any other ground not concealed but open to the observation of the

company, it should have been stated before the property was received." And (79 U. S. 273) that "the common carrier is regarded as an insurer of the property carried, and upon him the duty rests to see that the packing and conveyance are such as to secure their safety."

In the case of *Northwestern Marble & Tile Company* v. *Joseph Williams*, 128 Minn. 514, the Court took occasion to review all of the authorities, and said:

> "The better and the more general rule seems to be that, if goods presented for carriage are not properly packed, and that fact is apparent to the carrier or his servants upon ordinary observation, then the carrier may refuse to receive the goods in that condition; but, if he does see fit to receive them, he assumes to carry them as they are and his full common law liability as carrier attaches to the contract of carriage. *McCarthy & Baldwin* v. *Louisville & A. R. Co.*, 102 Ala. 193; *Elgin, etc., R. Co.* v. *Bates Mfg. Co.*, 98 Ill. App. 311; *Elgin, etc., R. Co.* v. *Bates Mfg. Co.*, 200 Ill. 636; *The David and Caroline*, 5 Blatch. (U. S.) 268; *Klauber* v. *American Express Co.*, 21 Wis. 21; *Atlantic Coast Line R. Co.* v. *Rice*, 169 Ala. 265; *Hannibal R. Co.* v. *Swift*, 12 Wall. (U. S.) 262, 1 Moore Carriers, 559."

See also *Crawford* v. *Railway Co.*, 56 South Carolina, 136, 149.

In *Helliwell* v. *Grand Trunk Ry. of Canada*, 7 Fed. 68, 76, the Court said:

> "A carrier has no right to take a shipper's property for transportation, concealing from him at the time existing circum-

> stances within its knowledge, or within its fair and reasonable means of knowledge, and not within the knowledge of the shipper, that may incapacitate it for the full performance of its duty in the transportation of property, and then claim exemption from liability."

The doctrine of the *Dreyfus* case and of the *Tattersall* case, is that a carrier is not entitled to the benefit of exceptions unless he has provided a ship such as was in the contemplation of the parties at the time the goods were accepted. This doctrine may also be stated thus: Carriage must not be undertaken under circumstances not reasonably within the contemplation of the parties, and, if carriage is undertaken by a carrier under such circumstances, he cannot avail himself of the benefit of the exceptions against liability when the goods are damaged.

Expressed in another way, the rule announced in the *Dreyfus* and *Tattersall* cases is that a carrier is not entitled to the benefit of the bill of lading or common law exceptions unless he is, in fact, as able to carry the goods safely to destination without breakage or damage, as an ordinarily prudent cargo owner would assume from the carrier's holding himself out as a skillful and competent carrier of the particular goods which he accepts for carriage. (For a full discussion of this theory of a common ~~law~~ carrier's liability, see the essay on bailments in The Common Law, by Oliver Wendell Holmes, Jr.). Indeed, these doctrines would seem to be corollaries of the rule announced in *The Delaware,* 14 Wall. 579 (discussed in our principal brief at p. 47). There

this Court held that a contract of carriage which was silent as to whether goods were to be carried on deck or under deck imported a carriage under deck. In effect that case holds that, if there is an extraordinary circumstance which is material to the contract, and which is known to the carrier, he must disclose such circumstance in the bill of lading or lose the benefit of the exceptions. At page 598 this Court said:

> "Goods, though lost by perils of the sea, if they were stowed on deck without the consent of the shipper, are not regarded as goods lost by the Act of God within the meaning of the maritime law, nor are such losses regarded as losses by perils of the sea which will excuse the carrier from delivering the goods shipped to the consignee unless it appears that the manner in which the goods were stowed is sanctioned by commercial usage, or unless it affirmatively appears that the manner of stowage did not, in any degree, contribute to the disaster; * * "

Here it appears that the apparent external leaky condition of the casks, when accepted for carriage, was the cause of the breakage. One of claimant's own witnesses, the foreman stevedore Richichi who discharged the cargo, testified:

> "No sir, what was broken was broken while we were working, because you could hardly move one of them without dragging it" (Record, p. 52).

Indeed, counsel for the claimant-respondent concedes at page 20 of his brief that none of the casks was damaged while on the *Mogador*, but that they were leaking while being loaded from

the *Mogador* on to the *Isla de Panay*. The insufficiency of the casks was manifest. The casks were leaking when they were accepted for carriage (Record, pp. 96, 97, 107, 122 and 129). The chief officer, the second officer, and the carpenter of the *Isla de Panay* all testified to this effect and that hoops fell off "from all over the casks" during loaded. The chief officer of the *Isla de Panay* also said:

> "In the first place, the carpenter is not a cooper. They need coopers for that. And, in the second place, if he did do that, to put all the hoops that came off, he would need at least eight or ten days" (Record, p. 108).

Indeed, at pages 18, 19 and 20, counsel for the claimant-respondent concedes that the casks were insufficient and were leaking.

The carpenter of the *Isla de Panay* testified that four hours after the *Isla de Panay* left Cadiz, the water in the bilges increased to twelve inches (Record, p. 126). Ordinary soundings would show only three to four inches (Record, p. 127).

This Court has held in *The Delaware* (*supra*), that, if a carrier accepts goods for carriage and conceals the fact that he intends to carry the goods on deck, he loses the benefit of the bill of lading and common law exceptions. Our position is that this claimant-respondent, by accepting for carriage casks which were obviously unfit for carriage, with full knowledge that the casks were leaking, and their ability to withstand ordinary handling being thereby impaired, and by conceding such facts from the consignee, thereby lost

the benefit of the bill of lading and common law exceptions against liability. This, as we understand it, is the position which the English courts took in the *Tattersall* and *Dreyfus* cases cited above.

For another reason this first point of claimant-respondent appears to be unsound. If the claimant-respondent really believed that the bill of lading or Harter Act exceptions applied to the present case, why did it not merely issue the bills of lading containing the exceptions without exacting in addition letters of indemnity from the shippers? The conduct of the ship's agent in exacting the letters of indemnity shows his belief that this was an abnormally bad case and therefore outside the bill of lading exceptions.

POINT II.

This Court should not overrule the decision in the *Higgins case*, 248 Fed. 386, that the ship is estopped from relying on insufficiency of package.

The Courts below went to great lengths in their opinions to distinguish the *Higgins* case from the present case on the ground that in that case the bill of lading recited that the goods had been shipped "in apparent good order and condition." In his brief in this court, however, counsel for the claimant-respondent being apparently persuaded that this distinction is unsound in view of the decisions of this Court quoted in our principal brief, assumes that the *Higgins* case and the present case are identical. Based on

this assumption counsel for the claimant-respondent asks this Court not to follow the rule announced in the *Higgins* case.

Such reliance by the claimant-respondent on a rule different from that announced in the *Higgins* case would at first blush seem to be inconsistent with the distinctions he draws later on (at pp. 40 and 41 of his brief under another point) between the *Higgins* case and the present case. It is significant, however, that only one (the second) of those distinctions was even mentioned by either Court below in the present case, notwithstanding they were also made in the claimant-respondent's brief below. The distinctions are clearly unsound. The first distinction that the bills of lading here merely named innocent consignees, instead of being drawn to "shipper or order" and then endorsed, was referred to by Judge Learned Hand in his opinion in the District Court in the *Higgins* case, 242 Fed. 568, 571, as follows:

> "The excuse that a bill of lading is not negotiable has no authority whatever, nor have any of the authorities cited any bearing on the case where a false statement is deliberately inserted to be acted upon by innocent third persons. To allow the ship to escape liability under such circumstances would be intolerable."

See in this connection pages 55 and 56 of our principal brief.

The third distinction on page 40 of claimant-respondent's brief is that "in that case the question of insufficiency of containers was not involved. The respondent there attempted to show

that the goods were actually damaged on shipment. Here no claim is made that the petitioners' olives were in a damaged condition when shipped. The claimant respondent simply contends that the casks were not strong enough to insure the safe carriage of their contents, if properly handled." Counsel for the claimant-respondent admits, however, on page 20 of his brief, that the casks "were leaking, many of them when transshipped aboard the *Isla de Panay* at Cadiz and some of their hoops dropped off." The chief officer, second officer and the carpenter of the *Isla de Panay* testified that the casks were leaking while being loaded on the *Isla de Panay* "the staves being somewhat apart" (Record, pp. 96, 97, 107, 122, 129). Under these circumstances it requires courage to say that the casks were not "in a damaged condition" when shipped.

The fourth distinction on page 41 of the petitioners' brief is, we think, conclusively answered on pages 14 to 18 of our principal brief.

The question involved in *Iron Mountain Railway* v. *Knight*, 122 U. S. 79, quoted at page 35 of the claimant-respondent's brief, was whether the bill of lading contained a warranty that the goods described should answer any particular quality not apparent to an ordinarily prudent shipmaster on observation of their external condition. This clearly appears from the opinion of the Court (122 U. S. 79, 85), where it is said:

> "It is not denied that the railroad company delivered to the plaintiffs below the whole number of bales of cotton mentioned in the bills of lading, with external marks thereon as called for, and that no change

> was made in the cotton or in the marking thereof after it was loaded on the cars for transportation at Texarkana, and that no damage or loss was occasioned by reason of any want of care or diligence in the transportation. The bill of lading contains no warranty that the goods described shall answer any particular quality; on the contrary, it expressly specifies that the contents of the packages are unknown. That a bill of lading in such cases does not operate as such a guaranty appears from the case of *Clark* v. *Barnwell*, 12 How. 272, where Mr. Justice Nelson, delivering the opinion of the court (p. 283), said: 'It is obvious, therefore, that the acknowledgment of the master as to the condition of the goods when received on board extended only to the external condition of the cases,' * * *"

Furthermore, the Court in that case held that the relation of the carrier to the goods while the cotton was being compressed and before it was accepted for carriage, was not that of a carrier and shipper, but that "its liability as common carrier began only when specific lots were marked and designated at Texarkana, and specifically set apart to correspond with a bill of lading then or previously issued" (122 U. S. 79, 80). And at page 93 this Court further said:

> "No specific bales of cotton, as the property of the plaintiffs, separate from all others, were delivered to the defendant for them until the 525 bales in controversy were set apart and delivered to the defendant for immediate transportation on its cars; and prior to that time all cotton received in the warehouse to be compressed was received as the property of Potter,

> on his account, and subject, so far as grading, classifying, and marking were concerned, to his control, and none of it could be considered as having passed into the possession of the defendant as a common carrier for transportation until designated and set apart by Potter or his agents."

Indeed, this Court apparently assumed throughout its opinion in the *Iron Mountain* case that if incorrect marking of the goods was apparent to an ordinarily prudent carrier at the time of acceptance for carriage, the carrier would be liable to the consignee.

That the relation between the carrier and the owner of the goods is one of confidence has long been recognized. As early as the case of *Coggs* v. *Bernard*, 2 Lord Raymond, 909, Chief Justice Holt said:

> "The reasons for a carrier's liability are, first, because in such case a neglect is a deceit to the bailor."

This duty is imposed on the carrier partly because of his exclusive possession of another man's goods, and partly because he holds himself out to the public as specially skilled and able to carry goods safely. The libels in the present cases are for "cargo damage" (Record, p. 2), and allege that the ship failed to deliver the cargo in good condition. Counsel for the claimant-respondent has admitted (Claimant-Respondent's Brief, p. 20), that the casks "were leaking, many of them" and were in apparent bad condition, when received on board the *Isla de Panay*, and that the casks were broken during carriage by the *Isla de Panay*, and then relies, as an excuse, on the fact

that "THE CASKS WERE NOT STRONG ENOUGH TO INSURE THE SAFE CARRIAGE OF THEIR CONTENTS IF PROPERLY HANDLED" (Claimant-Respondent's Brief, p. 41), (Capitalization ours.) Even in the absence of a relation of confidence, it would seem that a carrier should, under such circumstances, be required, when issuing his bill of lading, to disclose to an innocent consignee this apparent unfitness of the casks to withstand the ordinary handling incident to carriage. In any event, the fact of unfitness for carriage should not excuse a carrier from a promise, made with knowledge of such unfitness, that it would carry the goods safely to destination.

CONCLUSION.

We respectfully submit that the decree below should be reversed with costs.

Respectfully submitted,

Dated, New York City, January 17, 1925.

T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Petitioners.

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Supreme Court of the United States

OCTOBER TERM, 1923.

No. .....

AUSTIN NICHOLS & COMPANY, EUG. SANCHEZ and JOSE GILDE SAGREDO, co-partners trading as E. Sanchez & Company, and E. TOLIBIA & COMPANY,
Petitioners,

against

Steamship ISLA DE PANAY; COMPANIA TRASATLANTICA,
Claimant-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The petitioners herein seek to have reviewed by a writ of *certiorari* the decision of the United States Circuit Court of Appeals for the Second Circuit, affirming the decrees of the District Court of the United States for the Southern District of New York, dismissing the libels herein.

The respondent herein, Compania Trasatlantica, appeared as claimant and owner of the steamship Isla de Panay in the courts below.

POINT I.

The claimant-respondent, Compania Trasatlantica, is not estopped from showing that the petitioners' casks were defective containers.

The petitioners, in support of their contention that the respondent is estopped from showing that the casks involved in the instant cases were improper containers, rely upon the case of *Higgins et al. v. Anglo-Algerian S. S. Co., Limited*, 248 Fed., 386, reversing the decision of the District Court reported in 242 Fed., 568.

The present cases have many features which distinguish them from the Anglo-Algerian case, namely:

1. In the Anglo-Algerian case the respondent alleged that the cargo, which consisted of dates, was damaged by rain before shipment on the steamer. The respondent in the instant cases does not contend that the petitioners' olives were in a damaged condition when shipped, but maintains that the containers in which they were carried were of insufficient strength.

2. In the Anglo-Algerian case there was a specific statement in the bill of lading that the goods were received in apparent good order and condition. The bills of lading herein contained no such statement. Nothing was said in them

one way or the other concerning the order and condition of the goods.

3. The casks here were, as a matter of fact, in apparent good order and condition when received for shipment by the respondent in Seville.

1. The present cases involve the question of defective containers. No such point was involved in the Anglo-Algerian case.

Disregarding the provision of the respondent's bills of lading, freeing it from responsibility for loss caused by defective containers (Clause 7, Record, pages 438, 439), the Harter Act itself absolves the respondent from liability where the loss is due to insufficiency of package. We cannot conceive of a cause where a carrier raises the plea of defective containers in which it would not affirmatively appear or irresistibly follow that the containers were deficient at the point of shipment. Insufficiency of package, as we understand it, necessarily means that the packages are constructed of materials of insufficient strength to insure the safe transportation of the merchandise contained in them. If this is so, the defects in practically all cases would exist at the time of shipment. It would be an unusual case indeed where the packages, although strong enough and sound when shipped, became inherently defective on the voyage. Defects of package would in most instances be fairly obvious when the goods were shipped, and yet we know of no decision holding that the carrier is precluded from showing the condition of the containers even though it must have been apparent from the start.

A leading case is that of *The Konigin Luise*, 185 Fed., 478, where a suit was brought to recover for

the leaked out portion of a consignment of 200 barrels of olive oil shipped from Smyrna to New York. The bill of lading contained an acknowledgment of receipt of the goods in good order and condition externally. The report of the decision of the District Court in 173 Fed., 811, shows (page 812) that the carrier raised the defense of insufficiency of package. The libellant also raised the question of estoppel, claiming to be a purchaser for value of a clean bill of lading. The District Court decided in favor of the libellant, and was reversed by the Circuit Court of Appeals, Second Circuit. The evidence showed that a large number of the barrels were found empty at New York, many of them having broken heads, loosened and missing hoops. Judge Lacombe, delivering the opinion, stated at the outset that although the barrels were in apparently good condition, they were not new barrels but a mixed lot of second hand barrels, some of them having patches on the staves. There was no proof of bad stowage or mishandling. The Court held that the carrier was exempt because the loss was due to breakage. Although the question of insufficient package was not specifically referred to by the Court, nevertheless that factor was involved in the case, and if the petitioners' contention is correct, the carrier should have noted on the bill of lading in the *Konigin Luise* case that the barrels were of inferior strength or be estopped for its failure to do so as against the libellant, a purchaser for value. Judge Adams in the lower court held, however, that the claimant and respondent were not estopped. This case, it is submitted, is a direct authority against the petitioners.

In *The Koranna,* 214 Fed., 172, the libellants sued for damage to a consignment of cocoanut oil pipes. The bill of lading acknowledged the receipt of the merchandise in apparent good order and condition.

Judge Hazel decided the case against the libellants solely on the ground of insufficient containers, and stated as follows at page 174:

> "There is much testimony in support of respondent's contention that the casks lacked strength and durability for so long a voyage. It is indisputable that the pipes of other shipments stowed in the same hold in the same way and subject to similar strains arrived in good condition, while libellants' casks were considerably damaged. Several coopers, who were witnesses, swore that the staves of the casks from which the oil leaked were old and rotted, and could easily be indented; also staves were found bearing score marks indicating repeated use. Three of the casks in question were inspected by the court on the sidewalk in front of the courthouse, and it was quite apparent that part of the staves were pressed in at the quarters and were old and tender to pressure, and that the bilges were impaired. It is quite true that cocoanut oil soaks into the wood and gives it a moldy appearance; but in the casks inspected by me the newer staves, which were easily distinguishable from the older ones, looked strong and lasting, while those that had evidently been previously used were decidedly weak and dilapidated, leaving the impression in my mind that the leakage was caused by improper

> cooperage in combining old and worn-out staves with new ones, thus producing casks which were unable to withstand the weight of their contents and the strains of the voyage."

The case of *The Orion,* 290 Fed., 379, is quite similar to the present ones. There the shipments consisted of barrels of olives and olive oil. The bills of lading acknowledged receipt of the packages without any reference to their order and condition, one way or the other. The respondent and claimant contended that the packages were old and weak and not sufficient containers for the carriage of olives and sulphur olive oil. The District Court held that the sulphur olive oil barrels were insufficient containers and dismissed the libels based upon the loss of that commodity. The oil leaked so badly from these barrels after they were received on board the Orion at Seville, that the Orion was obliged to pump large quantities of oil from the bilges before leaving port. If the Anglo-Algerian case had been considered applicable to such a state of facts, the carrier would have been held estopped from showing the insufficiency of the sulphur oil containers, for it was evident upon shipment that they were defective in strength. *The Orion* was a consolidated cause consisting of numerous suits brought in *rem* against the ship and in *personam* against her charterer.

2. Another very important feature distinguishing the Anglo-Algerian case from the present ones is that the bills of lading here (Claimant's Exhibit 2, Record, pages 437-443) contained no recital that the goods were received in apparent good order and condition as the bill of lading in the Anglo-

Algerian case did. There is no statement one way or the other concerning the condition of the merchandise. But, it is argued by the petitioners, the respondent is required by Section 4 of the Harter Act (7 U. S. Compiled Statutes, page 8587) to issue a bill of lading stating the apparent order and condition of the merchandise. The Harter Act, of course, applies to shipments between United States ports and foreign ports in either direction, but that does not mean that Congress has the power of regulating the issuance of a bill of lading in Spain, where these bills of lading were issued. Section 5 of the Harter Act (7 U. S. Compiled Statutes, page 8590) provides as follows:

> "For a violation of any of the provisions of this act, the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding $2,000."

The foregoing is the only penalty prescribed by the Harter Act for the issuance of a bill of lading which does not conform to the provisions of the Act. There is no penalty whereby a carrier, which has issued a bill of lading that is silent as to the order and condition of the goods, is automatically deprived of the benefits of the Act.

Passing by the absurdity of claiming that a person could be held subject to the penalty prescribed in the Act for an act done outside of the territorial jurisdiction of the United States, we call to the Court's attention that it is only in case of the refusal of the agent, owner or master of the vessel

to issue the bill of lading provided for in the Harter Act *on demand*, that the person so refusing becomes liable to the penalty prescribed. There is no proof of any such demand in these cases.

As bearing upon the sections of the Harter Act referred to, the case of *The Isola di Procida*, 124 Fed., 942, is in point. There a libel was filed in the Southern District of New York against the steamship Isola di Procida to recover damages for issuing a false bill of lading. The bill of lading was dated September 30th, 1901, on which date no merchandise had been received on the steamer. The goods in question were not received by the vessel until October 12th. Between the time when the brimstone should have arrived at New York if shipped according to the bill of lading, and the time when it actually did arrive, the price of brimstone had fallen, and the libellant who had paid the draft for the purchase price of the goods sued to recover the damage caused by the fall in the price of the merchandise.

Judge Holt, referring to Sections 4 and 5 of the Harter Act, stated as follows at page 944:

> "The true construction, in my opinion, of the provisions of the Harter Act in regard to bills of lading is that the rule previously established in the Federal courts that a false bill of lading is not binding on the owner or the ship still remains the law; but, if a false bill of lading is given, the person giving it is liable to a fine not exceeding $2,000, and the amount of that fine is made a lien on the vessel. But any damage caused by the falsehood does not create any lien on the ship. The true remedy

> of the party injured in such a case is an action against the person who actually issued the false bill of lading."

The libel against the ship was dismissed.

We are dealing in this record purely with facts and the fact is that the respondent made no representation to the petitioners that these goods were in apparent good order and condition when received for shipment.

The petitioners attach importance to the fact that the respondent received from the shippers so-called letters of guaranty, whereby the shippers agreed to hold the respondent harmless in case any damage should result from insufficiency of the packages (Claimant's Exhibits 13, 14 and 15; Record, pages 449-451). It is questionable, in the first place, whether these letters, all of them, constitute real guaranties, but assuming that they do, what have they to do with the question of estoppel? It is true that guaranties were referred to by the Court in its decision in the Anglo-Algerian case, but an examination of the decisions of the District and Circuit Courts will show that the giving of the guaranties was not the decisive point in the case at all. How can they possibly constitute an element of estoppel? An estoppel is created by representations by one person to another, on which the other relies to his detriment. The present petitioners never saw these so-called guaranties. Whatever representations they saw were contained in the bills of lading.

Equitable estoppel is defined in 21 Corpus Juris, page 1113, Section 116, as follows:

> "1. Estoppel by misrepresentation, or equitable estoppel, is defined as the effect of

> the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right either of contract or of remedy. This estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts. It consists in holding for truth a representation acted upon, when the person who made it, or his privies, seek to deny its truth, and to deprive the party who has acted upon it of the benefit obtained."

The essential elements of an estoppel are wanting in these cases.

There is no provision in the Harter Act making it incumbent upon a carrier, as a condition of exemption from liability for loss due to insufficient packages, to make any notations on the bills of lading that the packages are insufficient. The obligations imposed upon the carrier are enumerated in the Act and this is not one of them.

The respondent also has an exemption against "fragile containers" in Clause 7 of its bill of lading (Record, pages 438, 439), which it has pleaded as a defense in its answer (Record, page 26).

3. Although the bills of lading contained no recital of that fact, the casks were actually in apparent good order and condition when received at Seville. By this we mean that the casks, while old ones and made of inferior material, were not damaged and broken when received on board the Mogador at Seville, for the shippers' coopers had been working on them while they were lying on the quay before shipment, tightening the hoops and the staves, replacing missing hoops with others, and stopping any leakages.

Captain Pastrana of the Mogador testified that brine was leaking from the casks on the quay at Seville, but that the coopers of the shippers had repaired the casks before they were loaded, which stopped the leakage for the time being (Record, pages 275, 276). He also testified that the coopers inserted paper in the joints between the staves and tightened the hoops; also that the casks were not broken at Seville, but that some of their hoops were broken, in place of which hoops others were substituted before the casks were stowed on the Mogador (pages 289-291). The captain further testified that no casks were broken when loaded aboard the Mogador (pages 291-293); that no leaky casks were loaded into the hold of the Mogador, but that they were left on deck and the shippers' coopers repaired the leakage (pages 293-295); also that none of the olives spilled out while the casks were being loaded at Seville (page 306).

Captain Pastrana is supported in this testimony by Diego Garcia, the foreman stevedore at Seville (pages 321, 322, 347, 348); Jose Montiel, the boatswain of the Mogador (pages 348, 349); Mariano Santacana (pages 385, 386, 393), and Manuel Samano (pages 387, 388, 392, 393).

It is evident from the foregoing testimony that the casks were not broken and leaking when taken aboard the Mogador at Seville. They afterwards broke and loosened up simply because they were not strong enough containers both in material and construction.

An extension of the rule laid down in the case of *Higgins et al.* v. *Anglo-Algerian S. S. Co., Limited, supra,* to cases involving defenses of insufficiency of package under the Harter Act would mean that a carrier could never succeed in the defense of defective packages, which is now permitted by the Harter Act, unless in each instance notations were made on the bills of lading that the containers were insufficient.

As previously stated, the defects which would render packages deficient in strength are usually patent and not latent defects. In other words, the carrier can usually see, at the time when the goods are shipped, whether the barrels are old or new, whether they contain old or patched staves mixed with new ones or whether the wood in crates or other packages is too thin.

The statement at the beginning of the petition for a writ of *certiorari* that the questions presented for review were decided contrary to the decisions of this Court and of the Circuit Courts of Appeals of other circuits is misleading, to say the least. The precise question presented herein is whether a carrier which receives for shipment apparently defective containers and issues a bill of lading therefor, which states nothing one way or the other about their condition, is estopped as against an innocent purchaser of the bill of lading from proving the containers insufficient. This question has never been previously presented to any court in the United States.

POINT II.

The decision of the Circuit Court of Appeals covers actions in personam and in rem alike and turns upon the absence of a recital in the bills of lading that the goods were in apparent good order on shipment. The fact that the present suits happen to be in rem is therefore immaterial.

The petitioners apparently are basing this application almost entirely upon the holding of the Circuit Court of Appeals that no suit in *rem* could be maintained under the circumstances of the present cases. A reference to the concluding paragraph of the opinion of the lower court will show that the Court recognized the fundamental distinction between *Higgins et al.* v. *Anglo-Algerian S. S. Co., Limited, supra*, and the present cases because of the acknowledgment in the bill of lading in the former case of the receipt of the goods in apparent good order and condition, which recital is lacking in the bills of lading involved in the present suits.

The lower court, in the paragraph referred to, stated as follows:

> "In the Higgins case the bills of lading recited that the shipments had been received in good condition. In the instant cases the bills of lading contain no representation as to their condition one way or the other, and the distinction is vital."

It is quite clear therefore that the decision of the Circuit Court of Appeals would have been the

same even if the suits had been begun in *personam* against the respondent herein. In other words the fact that the libels herein were in *rem* against the ship is not the actual turning point of the decision. Undue emphasis has therefore been laid by the petitioners upon the references in the lower court's opinion to the non-liability of the ship to the petitioners.

POINT III.

The petition for a writ of certiorari should be denied.

Dated, October 19, 1923.

Respectfully submitted,

JOHN W. CRANDALL,
Counsel for Compania Trasatlantica,
Claimant-Respondent.

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Supreme Court of the United States

OCTOBER TERM, 1924.

AUSTIN NICHOLS & COMPANY, Petitioner, against THE STEAMSHIP ISLA DE PANAY, COMPANIA TRASATLANTICA, Claimant-Respondent.	No. 199.
EUG. SANCHEZ and JOSE GILDE SAGREDO, co-partners, trading as E. Sanchez & Company, Petitioners, against THE SAME.	No. 200.
E. TOLIBIA & COMPANY, Petitioner, against THE SAME.	No. 201.

BRIEF ON BEHALF OF THE CLAIMANT-RESPONDENT.

Statement of Facts.

These are three writs of certiorari to three decrees of the United States Circuit Court of Appeals for the Second Circuit, affirming decrees

of the United States District Court for the Southern District of New York dismissing the libels of the petitioners against the Spanish Steamship Isla de Panay.

The petitioners filed separate libels against the Isla de Panay, claiming damage to certain consignments of olives carried by the Isla de Panay from Cadiz, Spain, to the port of New York on her voyage ending November 20, 1917 (pp. 2-20). (Note: All page references unless otherwise designated, refer to the record herein.) The Compania Trasatlantica, owner of the vessel, was not joined in the suits and therefore appears only as claimant of the vessel. (In this brief the parties will be referred to throughout as the petitioners and the claimant-respondent respectively.)

The petitioners' olives were shipped at Seville, Spain, on the Steamship Mogador, a small river boat also owned by the Compania Trasatlantica. From Seville they were transported down the Guadalquiver River to Cadiz, Spain, and there transhipped aboard the Isla de Panay (p. 74, fol. 142). The Mogador experienced good weather (p. 191, fol. 369). Sixty-nine casks were taken from Seville to Cadiz by rail (p. 155, fols. 282, 283). The bills of lading were issued in Seville (p. 82, fol. 156).

The damage to the casks was due to breakage, which was within the exemptions of the claimant-respondent's bills of lading (p. 11, fol. 26). The claimant-respondent also contended that the petitioners' casks were improper containers (p. 11, fol. 26, p. 13, fol. 30). (Note: As all of the answers to the libels are substantially the same, only one will be referred to.)

The three actions were tried together. The peti-

tioners offered no evidence of negligent stowage. It was conceded in fact by the petitioners' surveyors that the stowage was proper. Furthermore, practically no evidence was offered as to any negligent handling of the casks.

The principal contention of the petitioners at the trial was that the insufficient strength of the casks must have been apparent to the claimant-respondent's representatives at Seville; that therefore a notation of such insufficiency should have been made upon the bills of lading, and that the claimant-respondent, by issuing and delivering bills of lading containing no such notation, in consideration of so-called guaranties of the shippers to hold it harmless if any damage resulted to the goods while in transit, had committed a fraud upon the petitioners who were alleged to be innocent holders of the bills of lading for value. The petitioners accordingly argued that the carrier was estopped from raising the defense that the containers were insufficient in strength.

The District Court, finding no evidence of bad stowage or improper handling on the part of the claimant-respondent, held that the casks were insufficient containers, and that the claimant-respondent was not estopped from showing this fact. The three libels were accordingly dismissed (pp. 222-225).

The petitioners thereupon appealed to the United States Circuit Court of Appeals for the Second Circuit which affirmed the decrees of the District Court (pp. 231-242). (See: *The Isla de Panay*, 292 Fed., 723.) The petitioners then filed a petition for writs of certiorari to review the decrees of the Circuit Court of Appeals, which petition was granted on November 12, 1923, by this Court (p. 244).

Although the stowage and handling of the cargo were proper in all respects, the petitioners have not formally conceded this. We have therefore covered the subject in Point I. In Point II the insufficiency of the containers is discussed. We have done this principally with the idea of furnishing to the Court as brief a resumé as possible of the evidence showing the fragility of the casks.

The real questions before this Court, which are considered in Points III and IV, arise out of the petitioners' allegations of fraud on the part of the carrier in the issuance of the bills of lading.

The Decision of the Circuit Court of Appeals.

The Circuit Court of Appeals referred to the fact that the bills of lading issued for the casks of olives were issued at Seville, Spain, by the captain of the Mogador and not by the captain of the Isla de Panay at Cadiz, the transhipment point. The Court held that the casks, which were constructed of chestnut instead of oak, were not proper containers for olives; that the stowage of the casks was proper; that there was no evidence of negligent handling by the ship; that the casks were broken and that therefore the ship was exempted from liability by the breakage clause of the bills of lading.

As regards the petitioners' claim of estoppel, the Court decided as follows: That bills of lading have a dual character, being both contracts and acknowledgments of the receipt of the goods shipped, and that as receipts they may be contradicted by parol evidence; that the bills of lading in question did not need to be contradicted as they made no mention of the condition of the casks when re-

ceived; that the bills of lading were straight bills of lading within the terms of the act of August 29, 1916, known as the Bills of Lading Act, because the goods were consigned to specific persons, and that pursuant to Section 29 of the Act a straight bill of lading cannot be negotiated free from existing equities; that where the consignee of a straight bill of lading pays the consignor for the goods before receiving them, or directs payment through his bankers on the presentation of a clean bill of lading, he makes such payment at his own risk, and if the goods prove to be damaged he cannot hold the ship except on proof of negligence. The Court pointed out that the so-called letters of guaranty were not addressed to the Isla de Panay or to her master, but to the Compania Trasatlantica at Seville, and that inasmuch as neither the captain nor any officer of the Isla de Panay saw these letters or had anything to do with them, no liability could be imposed upon the ship in rem.

The Court then referred to the provisions of the Harter Act, making it incumbent upon an owner or a master or agent of a vessel to issue a bill of lading stating among other things the apparent order and condition of the merchandise received, and observed that before the passage of the Harter Act a bill of lading which made no representation one way or the other as to the condition of the goods would not operate as an estoppel against the shipowner to deny that the goods were in proper containers. The Harter Act was held not to have made a difference in this respect, inasmuch as the only penalty therein prescribed for failure to issue the required bill of lading on demand is a fine not exceeding $2,000. It was held that there was no estoppel.

POINT I.

The Circuit Court of Appeals correctly held that the petitioners were not entitled to a recovery against the steamship Isla de Panay, because the damage to the merchandise came within the exemptions of the bills of lading issued for the goods and the petitioners totally failed to prove negligence on the part of the ship or the claimant-respondent.

Clause 7 of the claimant-respondent's bill of lading provides as follows (p. 216, fols. 438, 439):

> "Also not responsible for * * * breakage of the articles * * *."

That the casks were broken is undisputed. The petitioners' witness, Sagredo, testified on cross-examination as follows (p. 23, fols. 54, 55):

> "Q. Do you admit that the casks themselves were weak? A. I couldn't tell you, because when I saw them they were all broken up. * * *
>
> Q. What seemed to be the matter with the casks? A. Well, all the staves were broken; some of them; not all. I had a shipment of 100 casks. Of course the brine ran out and if brine runs out olives lose their flavor and color and are not fit to eat."

Charles A. Thayer the Department Manager of Austin Nichols & Co., one of the petitioners, testified (p. 27, fols. 60, 61):

"Q. Did you examine these goods on the dock? A. Yes.

Q. What condition did you find? A. A great many of the casks were without brine. Some of the casks were entirely broken and when tendered to us by the Steamship Company were like bundles of staves and heads. The staves in a good many of the casks were cracked and broken which allowed the brine to leak off and on that account the olives had deteriorated.

Q. Some of the staves were actually broken? A. Broken, sappy.

Q. Did you see any of the casks that were not broken? A. Yes.

Q. In what condition were they? A. Sound; full of brine, and the contents were satisfactory."

Fred C. Rodman, the petitioners' surveyor, testified (p. 30, fol. 66):

"Q. Were the casks intact or were they broken? A. They were broken."

Collins Chivers, a cooper called by the petitioners, testified (p. 39, fol. 82):

"Q. Did you look down into the hold? A. Oh, yes.

Q. What did you see when you looked down? A. Well, I couldn't just mention the holds; I didn't take any notice—that is, the number of the hatches.

Q. You mean which hold it was? A. Yes, sir, but what I noticed was that the casks generally were in a bad condition.

Q. In what way? A. Some of the casks were broken.

Q. How were they broken? In what way? What was the nature of the break? A. There were broken staves and so on, broken chimes."

It is needless to multiply citations of testimony. The testimony of the claimant-respondent's witnesses also establishes that the casks broke.

Under these circumstances the burden of proof rested with the petitioners to show that the carrier was guilty of negligence in the stowing and handling of the olives. There is not a scintilla of evidence in the record showing negligent stowage of these consignments of olives. The petitioners did not produce a single witness, expert or otherwise, to establish negligence in this respect. Their counsel did not even argue the point at the trial.

The claimant-respondent, on the other hand, produced affirmative proof of good stowage, both on the Mogador and on the Isla de Panay.

We shall describe as briefly as possible the stowage on both vessels.

The port of Seville, Spain, is but a short run up the Guadalquiver River from Cadiz, the trip from Seville to Cadiz consuming only 8 or 9 hours (p. 166, fol. 308). The casks were loaded on the Mogador directly from the wharf at Seville, one by one in slings (p. 172, fol. 323). The Mogador is a small river steamer with two holds and two hatches, and 200 of the casks were stowed in her holds and 85 on deck (p. 162, fols. 298, 299; pp. 170, 171, fol. 319; p. 174, fol. 326; p. 173, fol. 325). The casks were stowed two tiers high, and in the after part of the forward hold about 20 or 30 casks were stowed over the other two tiers. No

cargo was stowed above the olives. All casks were stowed with bungs up and with quoins underneath to prevent the bilges touching the floor. The stowage was bilge and cuntline, or one on four, with chocks and quoins between all of the casks (pp. 162, 163, fols. 299-302; pp. 172, 173, fols. 323-325).

Upon arrival of the Mogador at Cadiz, the casks, according to the testimony of the witnesses taken under commission in Seville, were transhipped directly aboard the Isla de Panay (pp. 173, 174, fols. 325, 326).

The testimony also is that no damage was sustained by the casks while they were aboard the Mogador (p. 154, fol. 281; p. 174, fols. 326, 327; p. 179, fol. 341), and also that the 69 casks which were transported by rail arrived at Cadiz in the same condition as when they left Seville (p. 175, fol. 329).

The steamship Isla de Panay is a vessel of 3,484 gross and 2,087 net tons (p. 73, fol. 141). She is divided up into four compartments, the No. 1 hold being 59 feet long and 39 feet wide; No. 2 hold 62 feet long and 41 feet wide; No. 3 hold 44 feet long and 40 feet wide with 8 feet of allowance for fan or tunnel recess; No. 4 hold 72 feet long and 39 feet wide with 26 feet of allowance for fan or tunnel recess. Besides her lower holds she has upper and lower 'tween decks separated as just stated (pp. 91, 92, fol. 173; p. 73, fol. 141). The distance from the floor of the lower hold to the lower 'tween decks is 13 feet, and the distance from the top of the tunnel recess to the lower 'tween decks is 5 feet (p. 92, fol. 173). The above were the measurements of the various compartments and parts of the vessel on the particular voyage.

A combination diagram and stowage plan of the

ship is contained in Claimant's Exhibit 12, side folio 448, following page 220.

Practically all of the olives were stowed in lower holds Nos. 1, 2, 3 and 4. All of the casks were stowed with their bungs up and their bilges clear of the floor of the holds. The casks of olives, which were approximately 5 feet in length and 4 feet in diameter at the bilge, and weighed about 750 kilos each, were stowed two tiers high, bilge and cuntline, through the four holds, with the necessary wedges and quoins between all of the casks. In holds Nos. 1 and 2 the casks were stowed straight across the holds, while in holds Nos. 3 and 4 they were stowed on each side of the shaft tunnel.

The casks of olives occupied the height of about 9 feet in the lower holds, and on top of them were stowed small barrels of wine about ¼ or ⅙ of the size of the olive casks, as well as cases of wine and cases of chestnuts. Cargo battens were fastened to the frames of the ship and any empty spaces around the casks were filled in with small cargo or dunnage wood. One tier of olive casks was also stowed on top of the fan or tunnel recess, at the after end of the No. 4 hold, quoined and chocked as stated, with a few bags of chestnuts stowed over the casks. The space forward of the olives stowed on the fan was completely filled with cargo.

In addition to the casks which were stowed in the lower holds of the vessel, olive casks were stowed one tier high in the square of the hatchways Nos. 1, 2 and 3 in the upper 'tween decks, bungs up, and properly quoined and dunnaged. These casks in the upper 'tween decks were entirely surrounded by cargo, and above them were stowed bags and cases of chestnuts (p. 91, fol. 173; p. 96, fol. 180; p. 103, fol. 192—p. 108, fol. 199).

For a more detailed description of the stowage see the claimant-respondent's hypothetical question (pp. 64, 65).

A hypothetical question based upon the foregoing evidence was put to Captain Noel P. Pilcher, an expert for the claimant-respondent, and answered, as follows (p. 65, fol. 125):

> "Q. What is your opinion as to whether or not the stowage of the casks of olives as I have stated to you was the usual and customary method of stowing olives in the trans-Atlantic trade, and whether or not such stowage was proper? * * * A. Such stowage as you describe was customary and proper."

The same question was also put to Captain Walter G. Cocks, a surveyor of large experience at the port of New York and his testimony was as follows (p. 70, fol. 135):

> "Q. What can you state as to whether or not the stowage mentioned in that hypothetical question was proper stowage, and whether or not it is the usual and customary method of stowing olives? * * * A. It is excellent stowage. It is rather better than usual."

In this connection may we call to the attention of the Court the following statement, in paragraph 2 of the reports submitted by the surveyors for the cargo underwriters (Libellants' Exhibits 1 and 2, following page 214):

> "The casks were apparently well stowed, being tiered only two high."

There is practically no evidence as to any improper handling of the cargo. The petitioners produced one witness, Rodman, who said that the stevedores had crushed the casks in the squares of the hatches by letting down suddenly upon them slings of lemons, onions and chestnuts, and had dragged these sling loads from the after part of the hold over to the square of the hatch across the casks, thus loosening their hoops (p. 30, fol. 66; p. 31, fol. 68). Taking the testimony of this witness at its face value it is apparent that it is worthless from the petitioners' point of view. In the first place the witness admitted (pp. 35, 36, fol. 76) that he did not see any casks damaged by sling loads let down upon them, but that he was giving simply his own conclusions in that regard. Furthermore, according to Rodman himself, if the crates were dragged over the casks, as he concluded, they would only touch three or four casks at most (p. 34, fol. 73). The absurdity of the assertion that these sling loads loosened the hoops of the casks, assuming that they were dragged over the casks, is apparent when it is recollected that casks curve outward from their ends to their bilges. It would therefore be a physical impossibility to drag the slings of merchandise over the casks in such a manner as to loosen their hoops, for the slings would only touch the highest points of the casks.

Rodman's testimony, however, is absolutely contradicted by the stevedores who discharged the olives. In the first place, slings of cargo were not dragged over the casks to the square of the hatch. Where cases of merchandise were to be discharged, a platform sling would be placed in the square of the hatch and the cases would be passed from hand

to hand from their places in the stowage to the hatchway (p. 49, fols. 99-100; p. 56, fol. 110; p. 62, fol. 120). If it was ever necessary to bring out cargo in any other way, skids were invariably used (p. 50, fol. 100). According to the stevedores, it was utterly impracticable to place the cases on a platform sling and then drag the sling over to the hatchway (pp. 50, 51, fol. 101; p. 56, fol. 110; p. 62, fol. 120). In a case where the stevedores were obliged to get any of the small wine barrels over to the square of the hatch, they always rolled them on skids. It was infinitely easier to get them out in this manner than to roll them over the tops of the olive casks (p. 53, fol. 106; p. 62, fol. 119).

The three stevedores examined on behalf of the claimant-respondent denied that any slings of cargo were raised up and let down again on the casks in the square of the hatch (p. 49, fol. 99; p. 56, fol. 110; p. 62, fol. 119).

Captain Pilcher, the claimant-respondent's witness, testified that if these casks had been sound containers, the letting down of a sling containing crates of onions and chestnuts on them would not have any effect on them (p. 67, fols. 128, 129); and he further testified on cross examination as follows (p. 67, fol. 129):

> "Q. Do you think no precautions are necessary with good, strong oak casks of olives; hitting them with cargo as has been testified would not have any effect? You said no damage would be done by hitting these casks with cargo? A. If as described by Mr. Rodman where they were not dumped down on them and there would be a pressure brought to bear for a short time, it would not have any material effect upon good, sound containers. It

> would have, if you dropped 8 packages down the hatchway on top of them. It would break them."

Rodman testified that the crates of merchandise in slings were not dropped down on the casks, but let down on them.

The District Court took the same view of the discharging that Captain Pilcher did, and held that there was no evidence of any handling of the cargo by the stevedores which would cause damage, had the casks been proper containers (p. 122, fol. 455). The Circuit Court of Appeals also found no evidence of improper handling.

It has been held so often that the cargo owners assume the burden of proving negligence when the damage falls within a valid bill of lading exemption, that we shall refer briefly to but a few of the authorities.

Clark v. *Barnwell*, 12 Howard, 272, 19 Dec. of Sup. Ct., 130, is the most frequently cited case on the subject. There Mr. Justice Nelson said (p. 132):

> "For, as the masters and owners, like other common carriers, may be answerable for the goods, although no actual blame is imputable to them, and unless they bring the case within the exception, in considering whether they are chargeable for a particular loss, the question is, not whether the loss happened by reason of the negligence of the persons employed in the conveyance of the goods, but whether it was occasioned by any of those causes, which, either according to the general rules of law, or the particular stipulations of the parties, afford an excuse for the non-performance of

the contract. After the damage to the goods, therefore, has been established, the burden lies upon the respondents to show that it was occasioned by one of the perils from which they were exempted by the bill of lading, and, even where evidence has been thus given bringing the particular loss or damage within one of the dangers or accidents of the navigation, it is still competent for the shippers to show that it might have been avoided by the exercise of reasonable skill and attention on the part of the persons employed in the conveyance of the goods; for, then, it is not deemed to be, in the sense of the law, such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence, and inattention to his duty. Hence it is, that, although the loss occurs by a peril of the sea, yet if it might have been avoided by skill and diligence at the time, the carrier is liable. But in this stage and posture of the case, the burden is upon the plaintiff to establish the negligence, as the affirmative lies upon him."

In *The Henry B. Hyde,* 90 Fed., 114 (C. C. A., Ninth Circuit), the owners of cargo libelled the Henry B. Hyde for damage to certain goods caused by breakage. No evidence was produced by either side to show what caused the breakage. The bills of lading contained an exemption against breakage.

A decree dismissing the libel was affirmed by the Circuit Court of Appeals. Judge Gilbert delivered the opinion and stated at page 115:

"In the present case, no question arose concerning the nature of the damage that had

been sustained. The loss was wholly from breakage. It is so alleged in the libel. The ship was not accountable for breakage. There was nothing, therefore, for the carrier to prove in order to place the loss within the clause which excepted liability. In this respect the case differs from some of those which are cited by the appellants, such as cases where the carrier had stipulated against loss by the perils of the sea. The Giava, 56 Fed., 243; The Warren Adams, 20 C. C. A., 486, 74 Fed., 413. In such a case, the duty rests upon the carrier to show that the damage resulted from the perils of the sea. In the present case, the stipulation was explicit. The nature of the injury indicated for itself that it belonged within the specified exemption from liability. The burden of proof therefore, rested upon the libellants to establish by the evidence that the breakage occurred through the negligence of the ship's employes. No evidence having been offered to the court to prove such negligence, we find no error in the decree dismissing the libel. The decree will be affirmed."

It is not necessary for the carrier to show how the breakage occurred.

In *The Patria,* 132 Fed., 971 (C. C. A., Second Circuit), Judge Lacombe, discussing the exemption in the bill of lading against breakage, stated, at page 972:

"* * * but if the exception is 'damage by breakage,' and the article arrives broken, the ship is not required to show how it got broken —although the libellant may show that negligence of those on the ship, or of those who

stowed her or discharged her, caused the break, and, showing that, may recover."

See also:

The Lennox, 90 Fed., 308 (S. D., N. Y.).

It makes no difference whether the cargo owner or the carrier proves damage which falls within the exemptions of the bill of lading. It is sufficient if such fact appears in the record.

In *The J. L. Luckenbach,* 209 Fed., 142 (D. C. N. D., CAL.), the libellant's goods were received in a badly damaged condition caused by breakage and rust. There was no proof as to how the breakage occurred. The Court dismissed the libel and stated, at page 142:

"All of the damage shown, having been occasioned by breakage or rust, comes within the exemption in the bill of lading, and libellant cannot recover therefor, without proof that the breakage and rust were due to the negligence of claimant or his agents. Once it is shown that the damage arose from one of the excepted causes, whether this proof is made by libellant or by claimant, the burden is then upon the shipper to establish that the negligence of the carrier takes the case out of the exception. No such proof was presented here; the libellant being content to rest upon proof of breakage and rust from water. Neither of these shows any negligence on the part of the carrier."

The fact that an unusually large amount of damage may have been sustained by the cargo owners does not justify any inference of negligence on the part of the carrier.

In *The Arpillao,* 270 Fed., 426 (C. C. A., Second Circuit) (certiorari denied 255 U. S., 574), the Court said (p. 427):

> "We adhere to rulings of which the most frequently quoted is The St. Quentin, 162 Fed., 883, 89 C. C. A., 573 (and see also The Good Hope, 197 Fed., 149, 116 C. C. A., 573, and cases cited), to the effect that where the cause of cargo loss is covered by a valid exception, mere excessive or unusual loss is not in and of itself sufficient to establish a prima facie case of negligence against the carrier."

See also, on this point:

The Claverburn, 147 Fed., 850 (S. D., N. Y.);
The Neidenfels, 174 Fed., 293 (S. D., N. Y.).

The damage came squarely within the exemptions of the bills of lading, and the petitioners, having failed to meet the burden of proving negligence, were clearly not entitled to recover.

POINT II.

The petitioners' casks were of insufficient strength for the carriage of olives. The Isla de Panay is therefore exempt from liability both under the Harter Act and the exceptions of the bills of lading.

The Act of Congress of February 13, 1893, c. 105, 7 U. S. Compiled Statutes, p. 8573) commonly known as the Harter Act, provides that if the owner

of any vessel transporting merchandise or property to or from any port of the United States of America shall exercise due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel nor her owner shall be held responsible for damage or loss resulting from acts or omissions of the shipper of the goods and from insufficiency of package.

This Act was pleaded by the claimant-respondent (pp. 7, 13, 19).

Clause 7 of the claimant-respondent's bill of lading provides in part as follows (p. 216, fols. 438, 439):

> "Also not responsible for * * * breakage of the articles and fragile containers."

The claimant-respondent relied upon this clause in subdivision III of Article 7 in its answers (p. 5, fol. 11).

No claim was made by the petitioners that the Isla de Panay was unseaworthy. The evidence shows that she was a perfectly seaworthy vessel and properly manned, equipped and supplied at the beginning of the voyage in question. The trouble lay with the petitioners' casks, which were entirely insufficient for the carriage of olives. The claimant-respondent produced a large amount of evidence in support of this defense and the petitioners offered practically no evidence to contradict it, apparently relying upon their claim of an estoppel.

The claimant-respondent's evidence shows that the casks were made of chestnut wood instead of oak; that the staves were worn, the hoops rusty and thin, and the heads warped (pp. 155, 156, fols. 283-285; p. 158, fol. 289; p. 160, fol. 296; p. 176, fol. 333; p. 177, fol. 336). It is admitted that the wood in the casks was chestnut (p. 41, fol. 85). The ship-

pers had a gang of coopers working on the casks on the quay at Seville before they were shipped on the Mogador. They were tightening the hoops, inserting paper between the staves, replacing broken hoops and generally repairing them (pp. 151, 152, fols. 275, 276; pp. 158, 159, fols. 289-293).

The shippers' coopers succeeded in getting the casks repaired so that they were not leaking when they were taken aboard the Mogador (pp. 159, 160, fols. 293-295).

The officers of the Isla de Panay corroborated the testimony of the witnesses who were examined in Seville as to the condition of the containers. Captain Muslera of the Isla de Panay testified that these were the oldest casks that he had ever carried (p. 80, fol. 152; p. 81, fol. 155). The casks, although handled carefully while on the Mogador, and having suffered no damage while on that steamer, were leaking, many of them, when transhipped aboard the Isla de Panay at Cadiz, and some of their hoops dropped off (pp. 77-79, fols. 148-151; pp. 96, 97, fols. 180-182; p. 122, fols. 222, 223). Although the Isla de Panay did not encounter extraordinarily rough weather on her voyage, the wind never getting above 6 or 7 on the Beaufort scale (pp. 97, 98, fols. 182, 183) the soundings of her bilges soon after she left Cadiz, indicated the presence of olive brine (pp. 121, 122, fols. 221, 222; pp. 133-135, fols. 241-243; pp. 135, 136, fols. 244, 245).

At times the liquid would increase in the bilges to the depth of 15 to 17 inches (p. 121, fol. 221; pp. 124, 125, fols. 226, 227), although ordinarily the ship would have but a few inches in her bilges (p. 121, fol. 221).

Upon the ship's arrival at New York, the casks

were all in place in the stowage (p. 48, fol. 98), but when the stevedores attempted to handle them, the trouble commenced. The hoops broke off, and as soon as this happened the heads would come out (pp. 47, 48, fols. 96, 97; p. 52, fol. 104; pp. 55, 56, fol. 109; p. 61, fol. 117).

The casks which looked strong enough to roll to their allotted places on the pier were rolled, as is the customary practice (pp. 48, 49, fol. 98; p. 56, fol. 110; pp. 56, 57, fols. 111, 112; pp. 70, 71, fols. 135, 136), but in a great many instances these casks, which appeared sound, would fall to pieces when the stevedores would roll them (p. 56, fol. 110). In cases where the casks looked bad they were placed on wheel trucks and wheeled away from the ship and then rolled off from the trucks on to the pier on skids (pp. 48, 49, fols. 98, 99; p. 56, fols. 109, 110).

Captain Pilcher, one of the claimant-respondent's experts, a man of unusual qualifications (p. 63), testified with regard to the sufficiency of chestnut wood for olive casks, as follows (p. 66, fols. 127, 128):

> "Q. Are you familiar with the advantage or disadvantages of oak, chestnut, and other woods for olive casks? A. Yes.
>
> Q. What experience have you had with regard to observing different kinds of wood for olives? A. During the past six years in the Port of New York I have examined many thousands of casks, both of oak and chestnut wood and have gone to a considerable amount of trouble in making special surveys and reports to steamship companies concerning the examination. In 1919, the chestnut wood casks were coming in in such condition from Spain and

Italy with olives alone that we brought the attention in circular form to different ship owners and showed them as comparison the result of chestnut wood as compared with oak.

Q. Based upon your own observation? A. Absolutely, on special surveys, under my own observation.

Q. Based upon your own observation of the containers in which olives came in, will you tell us what are the relative merits of oak and chestnut for olive containers? A. My experience of oak containers has been that the results are good. The containers come here in fair condition and their contents are usually intact. With chestnut wood we invariably have some heavy leakage, whether it is the olive in brine or whether it is oil. The olives in brine, or the brine itself, causes the chestnut wood—which is softer than oak and more brittle—to become soggy. When it gets soggy and saturated the staves crack and when they are cracked you can see the saturation of the staves right through the staves. Also in carrying olives one must always consider the contents and that the hoops will rust. When the hoops get so rusted through the edge of the containers they burst and then the staves open; even though the heads do not come out the leakage of brine takes place; I would say that the chestnut wood containers would not compare with the oak containers for the carrying of oil or brine or any similar commodity.

Q. How long have the chestnut containers been used for olives? A. From experience I cannot say until 1916; but my experience on the Spanish coast, where I was for six months, showed me that it was the custom in Spain to

import oak in staves from this country and from Great Britain to make these containers. Since the war as a result of war conditions, and not being able to get the imported wood, they made them of chestnut. That applies to the olive oil also."

Captain Cocks, also an expert of wide experience (p. 70), testified that trouble is experienced generally with chestnut casks at New York (p. 70, fol. 135). Captain Cocks also testified on cross examination as follows (p. 71, fol. 137):

"Q. Then assuming the suggestions that I made bearing in mind that these same casks had two weeks before received all the handling that they had received in the small steamer and going into the large steamer, and had sprung no leaks and that on arriving at New York the casks were unbroken, you would naturally expect that they could be delivered alongside of the ship in fair condition? A. Am I advised that there had been leakage on the way?

Q. Yes. A. Then there would be a number of hoops slack, undoubtedly.

Q. Captain Pilcher thought that that would not make any difference? A. Well, I have noticed that it has where we have a big leakage of brine in the casks which we see in stow, they would invariably get slack.

Q. That would tend to open up the staves and make the— A. The staves would have to open up, but of course to allow leakage."

Previous to the war, olive casks were made of oak, but during the war, apparently owing to the scarcity of oak, they were made of chestnut, an ad-

mittedly inferior material. This is conceded even by the petitioners' own witnesses. Collins Chivers, a cooper, who testified for the petitioners, stated (p. 42, fol. 87):

> "Q. What kind of wood is best to make a cask out of? A. Oak.
>
> Q. What is the matter with chestnut casks? A. Well, so far as putting in chestnut generally the wood saps. It gets saturated and it don't hold; it is not as good and water-tight as oak."

And again (p. 43, fol. 88):

> "Q. Are chestnut staves as good for such purposes as oak staves are? A. The oak would be better.
>
> Q. Why are the chestnut staves not the best? A. Oak is understood by everybody in the business as the principal material that they use in making barrels, casks.
>
> Q. Why is it that the chestnut staves are not as good for olive casks? A. Well, they don't hold as good; that is, they are not water-tight to the same extent as the oak is.
>
> Q. Isn't chestnut a much softer wood than oak? A. Yes.
>
> Q. And much more brittle? A. Providing it would be dried out."

Also (p. 44, fol. 90):

> "Q. Is chestnut as strong a wood as oak? A. No.
>
> Q. Is a chestnut cask as strong as an oak cask? A. No, sir."

The following important testimony was also given by this witness (p. 44, fol. 91):

> "Q. Will you describe the condition of the casks? A. Well, there were some of them with the hoops rotten; that is, the iron was in a rotten condition and some of them were broken staves; some of them had broken chimes."

These casks were very large ones, weighing from 1,500 to 1,700 pounds each (p. 67, fol. 129). It was therefore particularly necessary that they be built of the strongest possible material, and held together by the best possible hoops. On the contrary they were constructed of an inferior class of staves and were bound with insufficient hoops.

What was the cause of the great leakage of olive brine on this voyage? It was not the result of any improper stowage, for that was admittedly good (Libellants' Exhibits 1 and 2, following p. 214). It was due to the insufficiency of the casks. And the leakage on the voyage, according to Captain Cocks, would cause the casks to become slack and their staves to open up (p. 71, fol. 137).

As to the insufficiency of the casks the trial Court said (Record, p. 222):

> "I think the great weight of evidence is to the effect that the chestnut casks containing the olives were old and insufficient at the time the merchandise left Seville for transhipment to claimant's vessel at Cadiz."

This conclusion was concurred in by the Circuit Court of Appeals, which said (p. 237, fol. 493):

> "In the instant cases the damage to the merchandise came within the exceptions of the

bill of lading, which declared that the shipowners were not responsible for breakage. That many of the casks were broken is undisputed. The burden of proof rested upon the libellants to establish negligence on the part of the claimant, and this burden we have no hesitation in saying was not sustained. On the contrary, it has been established by the overwhelming weight of evidence that whatever damage the merchandise suffered in the cases now before the court was due, not to the negligence of the ship, but to the old and insufficient containers in which the goods were shipped."

In the face of such evidence as that above cited, it is perhaps not surprising that the petitioners at the trial adopted the unusual expedient of admitting, by implication if not expressly, that their casks were insufficient, in order to bring themselves if possible within the rule of *Higgins et al.* v. *Anglo-Algerian S. S. Co., Limited, infra.*

POINT III.

The case of Higgins et al. v. Anglo-Algerian S. S. Co., Limited, 248 Fed., 386, which has been practically the sole reliance of the petitioners, is unsound, we submit, and should be overruled.

The decision in *Higgins et al.* v. *Anglo-Algerian S. S. Co., Limited,* which we shall refer to as the Anglo-Algerian decision, was rendered in 1918 by

the Court whose decrees are now under review herein. Although the petitioners strenuously argued below that the case supported their claim of estoppel, both of the lower courts held it to be inapplicable, pointing out various features which distinguished it from the instant cases. As no writ of certiorari was applied for therein, the soundness of the decision comes into question before this Court for the first time so far as we are aware.

The facts were these: Three thousand cases of dates were shipped on the steamer Armistan at Busrah, and a bill of lading was issued therefor reciting that they were received in apparent good order and condition. It was found on arrival of the ship at New York that 2,085 cases of the dates were damaged by contact with water. The libellants had become the owners and holders of the bill of lading in the ordinary course of trade. The respondent alleged that a number of the cases of dates were wet, stained and discolored by rain when received from the lighters, which condition had been noted on the mate's receipts, but that a clean bill of lading was delivered to the shippers at their request against their agreement to indemnify the respondent against loss for so doing. The respondent contended that this constituted an admission which was binding on the libellants that the casks were not shipped in apparent good order and condition. The District Court found that the cases were injured by rain water or sea water while on the lighters waiting delivery to the ship.

The libellants contended that the respondent was estopped from showing that the goods were damaged before shipment. The District Court (opinion reported in 242 Fed., 568), held that, conceding

the libellants' contention, the respondent was only estopped from denying that the goods were in apparent good order and condition, which left it free to show the actual condition of the goods, and that the damage thereto was occasioned by causes excepted in the bill of lading. The cause of action was essentially in contract. The Court said that the uttering of such a bill of lading was a tort, but that the libellants could have no relief in the admiralty action, first, because the cause of action was in contract and it was too late to amend the libel to set up an entirely new cause of action, and secondly, that the tort lay either in the issuance of the bill of lading at Busrah or the negotiation of same at New York, and that in either event the tort was committed on land and was outside of the admiralty jurisdiction. The libel was accordingly dismissed. The Circuit Court of Appeals for the Second Circuit reversed this decision and held that the respondent had been a party to a fraud perpetrated by the shippers upon innocent endorsees for value, and that, having introduced the evidence showing the fraud, it could not take the position that the libellants were recovering on a new and different cause of action.

It cannot be truly said that the libellants there obtained a recovery on contract and that the carrier was simply deprived of its defenses under its bill of lading. The Court really held the respondent liable in tort for falsely representing to the libellants that the goods were in apparent good order when received for shipment.

If a tort was committed it occurred either at Busrah on the issuance of the alleged false bill of lading or at New York, where the bill of lading

came into the possession of the libellants. It is probably correct to say that it culminated at the latter place. Obviously nothing was represented to the libellants until they saw the bill of lading at New York, for it came into their hands there in the ordinary course of business. The libellants therefore had no cause of action cognizable in admiralty.

In *Williams* v. *Providence Washington Ins. Co.*, 56 Fed., 159 (S. D., N. Y.), a libel was filed to recover under a policy of insurance issued by the respondent for the period of one year upon the canal boat General Williams against perils of the sea. The canal boat suffered damage through sea perils while lying at a dock at Stamford, Connecticut, in Long Island Sound. The lay-up clause was confined to the port, bay and harbor of New York. The place where the vessel sustained the injury was not within any of the limits covered in the policy. The libel alleged that the policy did cover navigation in Long Island Sound, according to the express representation of the respondent, and that upon the faith of such representation, the libellant accepted the policy and paid the premium. It was charged that this statement was falsely and fraudulently made, and the libellant claimed damages accordingly. The respondent excepted to the libel. Judge Addison Brown sustained the exception and said at page 160:

> "The libel does not in terms seek to reform the policy. If it did, that could not be done in this court, but only by a court of equity, upon a bill filed for that purpose. Of such an action this court would have no jurisdiction.

> Andrews v. Insurance Co., 3 Mason, 6, 16. The present action cannot be sustained upon the terms of the policy itself, because the loss occurred outside of the express limits of the policy. The complaint is, in fact, an action for false and fraudulent representations, by which the libellant was induced to accept the policy, supposing that he was insured for the Sound, when he was not. * * * As a tort, the case is not one of marine tort, because not arising upon the water, or in course of navigation. The exceptions are, therefore, sustained, and the libel must be dismissed; but, as the court has no jurisdiction, without costs."

In *The Plymouth*, 3 Wall., 20, several packing houses on land were destroyed by fire which originated on the steam propeller Falcon through the negligence of her crew, and spread to the buildings situated on the wharf, beside which the vessel was anchored. Mr. Justice Nelson, speaking for this Court, said at page 33:

> "It will be observed, that the entire damage complained of by the libellants, as proceeding from the negligence of the master and crew, and for which the owners of the vessel are sought to be charged, occurred, not on the water, but on the land. The origin of the wrong was on the water, but the substance and consummation of the injury on land. It is admitted by all the authorities, that the jurisdiction of the admiralty over marine torts depends upon locality—the high seas, or other navigable waters within admiralty cognizance; and, being so dependent upon locality,

> the jurisdiction is limited to the sea or navigable waters not extending beyond high-water mark."

It is apparent, therefore, that the Anglo-Algerian decision is contrary to that fundamental principle of the admiralty which makes the court's jurisdiction over torts dependent on locality.

Moreover, the case is opposed to the numerous decisions of this Court holding that the transferee of a bill of lading acquires no greater right against the issuing carrier than the transferor had.

In *Pollard* v. *Vinton,* 105 U. S., 7, the owner of a steamboat was sued on a bill of lading for the non-delivery of 150 bales of cotton, according to its terms. The bill of lading was signed by the general agents of the defendant-in-error. No cotton had been received for transportation, so that the statement in the bill of lading was false. The plaintiff was an innocent holder for value, having accepted and paid a draft attached to the bill of lading.

This Court affirmed the decision of the United States Circuit Court for the District of Kentucky, and with regard to the nature of a bill of lading said, Mr. Justice Miller delivering the opinion, at page 8:

> "A bill of lading is an instrument well known in commercial transactions, and its character, and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to

pass from hand to hand, with or without indorsement, and it is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. *Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into hands of persons who have innocently paid value for it.* The doctrine of *bona fide* purchases only applies to it in a limited sense." (Italics ours.)

A leading case is that of *Atchison, Topeka & Santa Fe Ry.* v. *Harold,* 241 U. S., 371. There J. Bell & Son sold a carload of bulk corn to the C. V. Fisher Grain Co. of Kansas City, Missouri, and on September 21, 1910 shipped the corn from Yanka, Nebraska, over the Union Pacific Railroad. The consignment was to Topeka, Kansas, to the order of the consignors with a direction on the bill of lading "notify C. V. Fisher Grain Company c/o Santa Fe for shipment." A draft for the purchase price of the corn was mailed to Kansas City accompanied by the bill of lading duly endorsed, and the Fisher Grain Company, while the corn was in transit, paid the draft upon presentation and became the owner of the bill of lading. On September 24th the Fisher Grain Company surrendered the Union Pacific bill of lading to a Santa Fe agent at Kansas City, Missouri, and obtained a Santa Fe bill of lading referring to the same car, then somewhere on the Union Pacific tracks, whereby the shipment of corn was consigned to the order of the Grain Company at Elk Falls, Kansas, on the Santa Fe Railroad, with the direction to notify the Nevling

Elevator Company at Elk Falls. The Santa Fe bill of lading, although signed and issued on September 24th, was dated September 21, 1910, at which time the Santa Fe Railroad had not come into possession of the car. Harold purchased the cargo of corn from the Grain Company and directed that delivery be made to Shoe & Jackson. The car was not tendered for delivery to the Sante Fe until September 28th and was rejected and turned back to the Union Pacific on account of its bad condition. The grain was transferred to another car which was delivered to the Santa Fe. The transferred car did not contain the same quantity of corn as the original car did on account of damage to a considerable amount of same, through the leaky condition of the first car. The car into which the corn had been transferred was carried by the Santa Fe to Elk Falls and delivery tendered. In the meantime the contract period between Harold and Shoe & Jackson for delivery of the corn had elapsed and there had been a decline in the market price and the purchaser refused to take the car. Harold thereupon commenced a suit against the Santa Fe for alleged unreasonable delay in the delivery of the corn at Elk Falls. The defendant alleged that the delay was due to the fault of the Union Pacific. The plaintiff was allowed a recovery in the trial court and the judgment was affirmed by the Supreme Court of Kansas, which held that the plaintiff became the purchaser of the bill of lading for value, and therefore had a right to rely upon the face thereof, and to treat the corn as having been received by the Sante Fe Railroad at Kansas City on the date of the issuance of the bill of lading. The State court held that the innocent holder of the bill of lading was invested with rights which were not available to the shipper.

The case came before this Court on a writ of error to the Supreme Court of Kansas. The decision of the Kansas Supreme Court was reversed and this Court, through Mr. Chief Justice White, stated at page 377:

> "That the local rule applied by the court below was in direct conflict with the general commercial law on the subject as repeatedly settled by this court, is plain. *Shaw* v. *Railroad Co.*, 101 U. S., 577; *Pollard* v. *Vinton*, 105 U. S., 7; *Iron Mountain Ry.* v. *Knight*, 122 U. S., 79; *Friedlander* v. *Tex. & Pac. Ry.*, 130 U. S., 416; *Mo. Pac. Ry.* v. *McFadden*, 154 U. S., 155; *The Carlos F. Roses*, 177 U. S., 655, 665.
>
> "Nothing could better point out the irreconcilable conflict between the local doctrine applied by the court below and the general law as illustrated in the cases cited than does the following statement in the opinion in the *Roses Case* last cited (p. 665):
>
> > 'A pledgee to whom a bill of lading is given as security gets the legal title to the goods and the right of possession only if such is the intention of the parties, and that intention is open to explanation. Inquiry into the transaction in which the bill originated is not precluded because it came into the hands of persons who may have innocently paid value for it.'"

This Court has by no means restricted the rule to cases where no goods at all were received by the carrier, but has applied it where the merchandise received was inferior in grade to that de-

scribed in bills of lading, regardless of whether the carrier's employes had knowledge of the facts or not.

In *St. Louis I. M. & S. Ry. Co.* v. *Knight et al.*, 7 Sup. Ct. Rep., 1132 (122 U. S., 79), the plaintiffs sued the railway company alleging that 525 bales of cotton received by them from the carrier were not of the grade and quality designated by the marks appearing on the bills of lading. The plaintiffs asserted that there [illegible] 500 bales of cotton of an inferior grade in the [illegible] house of the defendant which the employes of Potter, the seller of the cotton, with the knowledge of the defendant's freight agent, re-marked with marks corresponding to the quality stated in the bills of lading. The trial court instructed the jury that if the agent of the defendant accepted the cotton for shipment knowing that its quality was inferior to that called for by the bills of lading, and that the marks on the bales had been changed to correspond with the higher grade of cotton designated therein, the defendant was liable.

Such charge was held to be erroneous by this Court, which said, with reference to the charge, at page 1140:

> "Taken, as it must be, in view of the undisputed facts, it would make it to have been the duty of the defendant, when the cotton in question was tendered by Potter for delivery to the railroad company to be carried under the terms of the bills of lading sued on, to have refused the shipment altogether, on the ground that the goods offered did not correspond in grade and quality with those called

for by the bills of lading. As we have already seen, the defendant undertook no such obligation in respect to these plaintiffs. The only alternative, if they did not receive them, would be to reject them altogether, and to refuse to carry them. In that event, upon the facts as they stood, the plaintiffs would have lost the whole 525 bales, instead of merely the difference between the value of those actually carried and those which Potter had agreed to deliver. For, on this supposition, Potter had no other cotton except this to deliver, and the case would have stood, as between the plaintiffs and the defendant, upon bills of lading where no property at all had been received by the carrier for transportation, bringing it exactly within the rule declared in *Pollard* v. *Vinton*, 105 U. S., 7."

The judgment of the lower court in favor of the plaintiffs was reversed.

There is, we submit, no distinction in principle between those cases where a carrier's agent knowingly signs a bill of lading acknowledging the receipt of goods which either have not been received or else do not measure up to the quality called for by the bills of lading, and one where the agent signs a bill of lading reciting that the merchandise is in apparent good order when in fact it is not. If the circumstances under which a bill of lading has been delivered may be inquired into, even though it has reached the hands of an innocent transferee, the rule must necessarily be the same in all of the cases mentioned.

The fact that certain carriers have been made liable on bills of lading falsely stating that goods

have been shipped or incorrectly describing the class thereof, by Section 22 of the Bills of Lading Act of 1916 (Act of Aug. 29, 1916, C. 415), does not, it is needless to observe, alter the general principles underlying the decisions of *Pollard* v. *Vinton* and other cases, *supra*.

If the Circuit Court of Appeals, in disposing of the Anglo-Algerian case, had followed the principles of the cases cited above, it would have decided against the libellants, for it is evident that the original holders of the bill of lading there could have obtained no recovery against the carrier.

It is therefore respectfully submitted that the decision, for the reasons given, should be overruled.

POINT IV.

Neither the steamship Isla de Panay nor her owner, the claimant-respondent, is estopped from showing the insufficiency of the petitioners' casks.

The question as to responsibility of the Isla de Panay appears to us to have two phases: First, whether the acts of her owner on which the petitioners base their claim of fraud are imputable to her; and second, if so, whether the vessel is liable in any event under the circumstances. The Compania Trasatlantica was not joined in the suits.

With respect to the first angle of the question, the reasons given by the Circuit Court of Appeals for not holding the ship liable in rem are important. The Court held that the vessel was free from

liability for the following reasons: That the bills of lading and the letters of guaranty were respectively delivered at Seville, Spain, whereas the Isla de Panay received the merchandise at Cadiz, Spain, a transshipment port; that the bills of lading were not presented to nor seen by the master or any officer of the vessel at Cadiz, Spain; and that the letters of guaranty were neither given to nor seen by the master or any officer of the vessel at the time of the transshipment of the goods.

It seems elementary that the petitioners, in order to obtain a recovery against the vessel in rem, should be required to show some connection between the ship (through her officers) and the acts upon which they rely to establish their case. This they have completely failed to do. The Isla de Panay was not at Seville at all. She came through to Cadiz from Barcelona by way of the ports of Valencia, Almeria and Malaga (p. 103, fol. 193). The port of Seville, where the through bills of lading were issued and the letters of guaranty received, is situated some seventy-five miles up the Guadalquiver River above Cadiz. The guaranties were delivered to the claimant-respondent's agent at Seville in return for the bills of lading, which were signed, not by the captain of the Isla de Panay, but by the captain of the S. S. Mogador belonging to the same owner (pp. 211-212, fol. 419; p. 144, fol. 258). The Isla de Panay had not even reached Cadiz when the bills of lading were issued at Seville (p. 74, fol. 142; p. 218, fol. 443). The Mogador transported the casks down the river and delivered them to the Isla de Panay at Cadiz. The evidence amply sustains the conclusions of the Circuit Court of Appeals that neither the master nor any of the officers of the Isla de Panay

had anything whatever to do with issuing these bills of lading and obtaining the guaranties, and the Court's decision that the vessel could therefore in no event be held liable in rem appears unassailable.

The consequences of a contrary holding would be far reaching. Any act of a shipowner relating to the transportation of cargo received for shipment would then be held imputable to whichever of his ships subsequently carried it. Such a result would be absolutely opposed to the accepted theory of a vessel's responsibility in rem for damage to or loss of cargo. It does not follow that because a shipowner may be responsible for the acts of his ship the vessel is liable for the acts of her owner. A vessel may, of course, be attached under the laws of the various States in a suit at law against her owner but such procedure is not on any theory of liability in rem. She is simply the property of the owner and liable to attachment as such.

In *The Eli Whitney* (1848), Fed. Cas., 4345, a libel in rem was filed for the alleged breach of a charter-party. The court dismissed the libel. Mr. Justice Nelson, sitting in the Circuit Court for the Southern District of New York, held that parol evidence was inadmissible to enlarge or vary the terms of the charter-party, there being no stipulation in it as to the precise amount of cargo to be carried, and that, in the case of a charter-party, a suit in rem was not maintainable for the misrepresentation or concealment of facts by the master or owner of a vessel in respect to her tonnage or capacity, and affirmed the decree of the lower court.

The petitioners should have joined the Compania Trasatlantica in personam in these suits, in order to have presented directly before this Court the

points which they are urging, unless of course the vessel and her owner are to be treated as one for the purpose of determining liability.

This brings us to the second aspect of the question, which involves the assumption that the issuance of the bills of lading by the representatives of the claimant-respondent at Seville was in effect the act of the Isla de Panay. Can the vessel then be held liable? If the shipowner itself was not liable to the petitioners, certainly under no circumstances can the ship be held in rem.

We submit that the Compania Trasatlantica did nothing in connection with the issuance of the petitioners' bills of lading which would constitute a proper basis of an action for fraud against it in any court, and hence that it would not, if sued on the claims set up herein, be prevented from proving the actual defects in the casks.

Apart from the fact that the present suits were brought against the vessel only, there are four features which distinguish these cases from the Anglo-Algerian case, namely:

1. The bill of lading there provided that the merchandise should be delivered at New York unto order or to his or their assigns, whereas the bills of lading here were straight bills of lading, the goods being deliverable to designated consignees.

2. In the Anglo-Algerian bill of lading there was a specific statement that the goods were received in apparent good order and condition. The bills of lading herein contained no such statement. Nothing was said in them one way or the other concerning the order and condition of the goods.

3. In that case the question of insufficiency of

containers was not involved. The respondent there attempted to show that the goods themselves were actually damaged on shipment. Here no claim is made that the petitioners' olives were in a damaged condition when shipped. The claimant-respondent simply contends that the casks were not strong enough to insure the safe carriage of their contents, if properly handled.

4. The casks here were in fact in apparent good order and condition when received for shipment by the claimant-respondent in Seville.

1. The petitioners' bills of lading were straight bills of lading, the goods being consigned in each instance to a specified person.

The only bill of lading which is printed in the record is that of Austin, Nichols & Company (pp. 215-218). This bill of lading starts as follows (p. 215):

> "M. Rowlett and Pyman has shipped on board the Spanish steamer Isla de Panay, its Captain M with destination to New York (stamp) and consigned to Austin Nichols the effects declared on back * * *."

In the stipulation as to exhibits (p. 230, fol. 475) the parties have agreed "that the bills of lading are all of the same form and contents (with necessary changes in names and amounts), as the ones reproduced in the foregoing record."

The Act of August 29, 1916, C. 415, Section 2, 8 U. S. Comp. Stat., Section 8604aaaa, usually referred to as the Bills of Lading Act, was in effect when these bills of lading were issued. It defines a straight bill of lading as follows:

> "A bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill" (39 Stat., 539).

It is also provided in the same Act, Section 29, 8 U. S. Comp. Stat., Section 860400 as follows (39 Stat., 543):

> "A straight bill of lading cannot be negotiated free from existing equities, and the endorsement of such a bill gives the transferee no additional right."

The above quoted provisions made no substantial change in the existing mercantile law as recognized and applied by the courts of the United States and of England (aside from the English Statutes).

Scrutton on Charter Parties and Bills of Lading (Ninth Edition) states at page 168, Article 56:

> *"Semble.*—A bill of lading which does not contain some such words as 'to order', or 'to order or assigns', or which is indorsed in full, but without such words (k), is not a negotiable instrument (1).
>
> Note 1.—'Negotiable' is a term which perhaps strictly should be reserved for instruments which may give to a transferee a better title than that possessed by the transferor. A bill of lading is not 'negotiable' in this sense: the indorsee does not get a better title than his assignor (m). A bill of lading is 'negotiable', to the same extent as a cheque marked 'not negotiable', i. e., it is 'transferable'."

An order bill of lading is defined by the same Act, Section 3, 8 U. S. Comp. Stat., Section 8604b, as follows:

> "A bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill is an order bill."

Negotiation of an order bill of lading is covered by Section 30 of the Act.

The Anglo-Algerian bill of lading was an order bill as recognized by the commercial law and as later defined by the Act. (It was issued before the Act took effect.)

As the transportation of the petitioners' goods was from a foreign port to a United States port, it would appear not to come expressly within the terms of the Act. However, it would be little short of absurd to say that a bill of lading wherein the goods are stated to be consigned to a specified person, is to be classified as a straight bill on outbound, but not on inbound, foreign shipments. If it is a straight bill in one direction it cannot be something different in the opposite direction.

At any rate it is immaterial whether we look to the Act or to the general commercial law as fixed by this Court in numerous decisions in order to ascertain what are the rights of holders of this type of bill of lading. In no case do they acquire rights beyond those of their transferors. The rule followed in *St. Louis I. M. & S. Ry. Co.* v. *Knight et al.; Pollard* v. *Vinton* and other cases *supra* would apply *a fortiori* to straight bills of lading.

The Circuit Court of Appeals, holding that the petitioners' bills of lading were straight bills, said (Record, p. 239):

"The bills of lading in the instant cases were straight bills of lading. The Act of August 29, 1916, known as the Bills of Lading Act, declares 'That a bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill.' 39 Stat. L., p. 539, Sec. 2. And the Act makes straight bills non-negotiable and order bills negotiable. Section 29 of the Act provides that a straight bill cannot be negotiated free from existing equities. Where the shipper names another as consignee the title to the goods is in the person so named. George F. Hinrichs, Inc. v. Standard Trust & Savings Bank, 279 Fed., 382, 386. If the consignee in a straight bill pays the consignor for the goods before he receives them, or directs his banker to pay for him on the presentation of a clean bill of lading he pays at his own risk. If the goods reach him in damaged condition he cannot hold the ship liable unless he can show that the damaged condition of the merchandise was occasioned by the ship's default. In the instant cases no such default on the part of the ship is shown."

If the shippers had sued the Compania Trasatlantica or the Isla de Panay for this damage they could not have recovered, for the loss was due to insufficiency of package, against which they had indemnified the shipowner. As the petitioners took their bills of lading subject to any equities existing between the carrier and the shippers, they stand in the position of the shippers, with no right of recovery herein.

2. The Anglo-Algerian bill of lading contained an

express statement that the goods were received in apparent good order and condition. The petitioners' bills of lading (Claimant's Exhibit 2, pp. 215-218) on the contrary, contained no such statement. They simply acknowledged that the merchandise had been received and made no mention of its condition.

The lower Court considered that the absence of such a statement (aside from other grounds of dissimilarity) created a vital distinction between the cases at bar and the Anglo-Algerian case. Concluding its opinion the Court said (Record, p. 242):

> "In the Higgins case the bills of lading recited that the shipments had been received in good condition. In the instant cases the bills of lading contain no representation as to their condition one way or the other, and the distinction is vital."

The petitioners have argued, however, that the claimant-respondent was required by Section 4 of the Harter Act (7 U. S. Compiled Statutes, p. 8587) to issue bills of lading stating the apparent order and condition of the merchandise.

Section 5 of the Harter Act (7 U. S. Compiled Statutes, p. 8590), provides as follows:

> "For a violation of any of the provisions of this act, the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding $2,000."

This is the only penalty prescribed by the Act for

the issuance of a bill of lading not in conformity with its terms. The claimant-respondent, however, would not be subject to such a penalty in this instance, for two reasons; first, because the bills of lading were issued in Spain, and although the Harter Act applies to shipments between United States ports and foreign ports in either direction, the penalty provided by the Act could not be enforced in a case where the issuance of the bills of lading took place in a foreign country; second, in any event, a carrier is subject to the penalty only in case of a refusal to issue the required bill of lading *on demand*. This record shows no such demand.

A carrier issuing a bill of lading which is silent as to the condition of the goods, is not thereby penalized by being deprived of the defenses ordinarily available under the Act. This contention was upheld by the lower Court (Record, p. 241, fols. 500, 501).

As bearing upon the sections of the Harter Act referred to, the case of *The Isola di Procida*, 124 Fed., 942 (S. D. N. Y.) is in point. A libel was filed against the steamship Isola di Procida to recover damages resulting from the issuance of a false bill of lading. The bill of lading was dated September 30, 1901, on which date no merchandise had been received on the steamer. The goods were not received by the vessel until October 12th. Between the time when the brimstone should have arrived at New York if shipped according to the bill of lading, and the time when it actually did arrive, the price of brimstone had fallen, and the libellant who had paid the draft for the purchase price of the goods sued to recover the damage caused by the fall in the price of the merchandise.

Judge Holt, referring to Sections 4 and 5 of the Act, stated, at page 944:

> "The true construction, in my opinion, of the provisions of the Harter Act in regard to bills of lading is that the rule previously established in the federal courts that a false bill of lading is not binding on the owner of the ship still remains the law; but, if a false bill of lading is given, the person giving it is liable to a fine not exceeding $2,000, and the amount of that fine is made a lien on the vessel. But any damage caused by the falsehood does not create any lien on the ship. The true remedy of the party injured in such a case is an action against the person who actually issued the false bill of lading."

The libel against the ship was dismissed.

No representation whatever was made either by the claimant-respondent or the Steamer Isla de Panay to the petitioners that their goods were even in apparent good order and condition when received for shipment.

The petitioners have laid great stress upon the obtaining by the claimant-respondent of so-called letters of guaranty from the shippers, whereby the shippers undertook to hold it harmless in case any damage should result from insufficiency of the packages (Claimant's Exhibits 13, 14 and 15 for identification, pp. 220, 221, fols. 449-451).

The Circuit Court of Appeals in the Anglo-Algerian case did mention the fact that a guaranty was received from the shipper, but an examination of its decision discloses that the delivery of the guaranty was not the turning point of the case. How can the fact that letters of guaranty were received

enter into the question of estoppel? The petitioners never saw these letters. They did not even know of their existence when they received their bills of lading.

The elements of an estoppel are well set forth in the case of *Central Improvement Co.* v. *Cambria Steel Co.*, 210 Fed., 696 (C. C. A., Eighth Circuit), at page 718:

> "The indispensable elements of an 'estoppel in pais' are: (1) Intentional or reckless misrepresentation of a known and material fact inconsistent with the subsequent claim of him who makes the misrepresentation; (2) ignorance of the truth and absence of equal means of knowledge of it by the party who claims the estoppel; (3) action by the latter induced by the misrepresentation; and (4) injury to the latter if the truth is permitted to be proved."

The lower Court herein, quoting in part from the American and English Encyclopedia of Law, said (Record, p. 238, fol. 495):

> " 'The general rule is that a bill of lading in so far as it admits the receipt of goods by the carrier and states the character, quality, quantity, or condition of the goods when they were received, is a mere receipt, and may be explained and contradicted by parol evidence.'
> *But in the instant cases the bills of lading do not need to be contradicted as they are silent as to the condition of the merchandise when it was received.*" (Italics ours.)

The petitioners have failed to establish any of the elements of an estoppel.

3. The Anglo-Algerian case did not involve the issue of insufficiency of package. Here the sole cause of the damage was the weakness of the casks, by reason of which the Isla de Panay and the claimant-respondent have claimed exemption from liability under the Harter Act as well as by Clause 7 of the Bills of Lading (p. 216, fol. 439; Claimant-Respondent's answer, p. 4, fols. 9, 10; p. 5, fol. 11).

The Harter Act allows a vessel and her owner complete exemption from liability for loss arising from insufficiency of package (in the absence of negligence) provided only that the owner of the vessel shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied at the beginning of the voyage. These requirements in the case of the Isla de Panay were fully complied with by her owner.

The petitioners' argument in effect is that a carrier, in a case where the sufficiency of the containers is doubtful upon shipment, must make an appropriate notation on the bills of lading at the risk of being deprived of its defense under the Harter Act by an estoppel. There is no such provision in the Act itself. If transportation companies are to be required to do what the petitioners demand, a condition will have to be read into the Harter Act which was not incorporated therein by Congress. Such a requirement cannot properly be implied, for if the Congress had intended the exemption to be conditional upon a carrier's noting the insufficiency of the containers on the bills of lading, it would have said so. It must be assumed that the legislators were cognizant of the fact that insufficiency of package is most often due to inherent deficiencies in the materials of which a con-

tainer is fabricated, which exist, and are apparent, when the package is shipped. The staves of a barrel do not ordinarily become bad after the voyage has begun. If a crate is frail, such condition obviously exists before shipment. Furthermore the Courts, in passing upon cases where the defence of improper containers has been pleaded have imposed upon the carriers no such condition as that suggested herein.

In *The Konigin Luise*, 185 Fed., 478 (C. C. A., Second Circuit), a suit was brought to recover for the leaked out portion of a consignment of 200 barrels of olive oil shipped from Smyrna to New York. The bill of lading contained an acknowledgment of receipt of the goods in good order and condition externally. The report of the decision of the District Court in 173 Fed., 811 shows (p. 812) that the carrier raised the defense of insufficiency of package. The libellant also raised the question of estoppel, claiming to be a purchaser for value of a clean bill of lading. The decree of the District Court, in favor of the libellant, was reversed by the Circuit Court of Appeals. The evidence showed that a large number of the barrels were found empty at New York, many of them having broken heads and loosened and missing hoops. The Court stated at the outset, that although the barrels were in apparently good condition, they were not new barrels but a mixed lot of second hand barrels, some of them having patches on the staves. There was no proof of bad stowage or mishandling. The Court held that the carrier was exempt because the loss was due to breakage. Although the question of insufficient package was not specifically referred to by the Court, nevertheless it was involved in the case, because the breakage was due unquestionably

to the poor condition of the barrels. If the petitioners' contention is correct, the owner of the Konigin Luise, not having noted on the bill of lading that the barrels were of inferior strength, should have been held estopped from showing breakage or insufficiency of container as against the libellant, a purchaser for value. Judge Adams in the lower court held, however, that the claimant-respondent was not estopped. This case is a direct authority against the petitioners.

In *The Orion*, 290 Fed., 379 (C. C. A., Second Circuit) various libels were filed against the steamship Orion and her charterer, the Ocean Transportation Corporation, for extensive damage to various consignments of olives, olive oil and sulphur olive oil. The bills of lading were in the same form as those of the petitioners to the extent that they were silent as to the condition of the merchandise when shipped. The sulphur oil leaked so badly after it was loaded aboard the Orion at Seville, Spain and before the vessel left that port that it was necessary to pump large quantities of it from the bilges every day. The District Court decided that the barrels containing the sulphur oil were insufficient containers and this decision was affirmed by the Circuit Court of Appeals. There were no notations on the bills of lading that the barrels were considered insufficient.

In *The Koranna*, 214 Fed., 172 (S. D., N. Y.), the libellants sued for damage to a consignment of cocoanut oil pipes. The bill of lading acknowledged the receipt of the merchandise in apparent good order and condition.

Judge Hazel decided the case against the libellants on the ground of insufficient containers, and stated as follows at page 174:

"There is much testimony in support of respondent's contention that the casks lacked strength and durability for so long a voyage. It is indisputable that the pipes of other shipments stowed in the same hold in the same way and subject to similar strains arrived in good condition, while libellants' casks were considerably damaged. Several coopers, who were witnesses, swore that the staves of the casks from which the oil leaked were old and rotted, and could easily be indented; also staves were found bearing score marks indicating repeated use. Three of the casks in question were inspected by the court on the sidewalk in front of the courthouse, and it was quite apparent that part of the staves were pressed in at the quarters and were old and tender to pressure, and that the bilges were impaired. It is quite true that cocoanut oil soaks into the wood and gives it a moldly appearance; but in the casks inspected by me the newer staves, which were easily distinguishable from the older ones, looked strong and lasting, while those that had evidently been previously used were decidedly weak and dilapidated, leaving the impression in my mind that the leakage was caused by improper cooperage in combining old and worn out staves with new ones, thus producing casks which were unable to withstand the weight of their contents and the strains of the voyage."

In the cases cited the condition of the barrels and casks was apparent on shipment. The defects which made the containers insufficient, namely, the intermingling of new and old staves, the use of

patched staves, etc., did not arise after the bills of lading were signed. They were patent and not latent defects when the goods were shipped. And the same may be said to be true of virtually all defects tending to weaken a package.

The fact, therefore, that the Harter Act allows exemption to carriers, subject only to the limitations already stated, where the loss is the result of the weakness of the packages themselves, is sufficient to exclude the instant cases from the principles of the Anglo-Algerian case, even if sound.

4. The petitioners' casks were actually in apparent good order and condition when received for shipment at Seville. This statement is not at all inconsistent with the fact that the casks were improper containers. All that a bill of lading acknowledgment that goods have been received in apparent good order and condition can mean is that they were not received damaged. These casks were neither in a broken nor otherwise damaged condition when stowed on the Mogador at Seville, for the shippers' coopers had been working on them for some time while they were lying on the quay before shipment, tightening their hoops and staves, replacing missing hoops with others, and stopping any leakages. If, therefore, the bills of lading had said that they were received in apparent good order and condition, the statement would have been true.

Captain Pastrana of the Mogador testified that brine was leaking from the casks on the quay at Seville, but that the coopers of the shippers had repaired the casks before they were loaded, which stopped the leakage for the time being (pp. 151, 152, fols. 275, 276). He also testified that the

coopers inserted paper in the joints between the staves and tightened the hoops; and that the casks were not broken at Seville, but that some of their hoops were broken, in place of which hoops others were substituted before the casks were stowed on the Mogador (p. 158, fols. 289-291). The captain said that no casks were broken when loaded aboard the Mogador (p. 159, fols. 291-293); also that no leaky casks were stowed in the holds of the Mogador, but that any such casks were left on deck and repaired by the shippers' coopers (pp. 159, 160, fols. 293-295); and that none of the olives spilled out while the casks were being loaded at Seville (p. 165, fol. 306).

Captain Pastrana is supported in his testimony by Diego Garcia, the foreman stevedore at Seville (pp. 171, 172, fol. 322; p. 182, fol. 348); Jose Montiel, the boatswain of the Mogador (pp. 182, 183, fols. 348, 349); Mariano Santacana (p. 198, fol. 386; p. 201, fol. 393), and Manuel Samano (p. 199, fol. 388; p. 201, fol. 392; p. 201, fol. 393).

There was little, if any, difference between these casks and the barrels involved in the case of *The Konigin Luise, supra.* There Judge Lacombe described the containers as being a mixed lot of patched second-hand barrels, and at the same time said that they were apparently in good condition when shipped.

The petitioners' casks, although apparently in good order for containers of their age, after they had been recoopered on the quay, broke and loosened up on the voyage simply because they were not strong enough containers for olives.

The petitioners in support of their claim of estoppel contend that a representation by the carrier that their merchandise was in apparent good

order must be implied because the bills of lading contained no endorsement to the contrary. If this were conceded to be so (which is not admitted) the petitioners would be in no better position, for the implied representation would be true.

The petitioners have followed a strange course. Their libels were drawn on contract and yet at the trial they demanded a recovery in fraud. The Anglo-Algerian case was decided in February, 1918, and these cases were tried in October, 1922. The petitioners made no move during the intervening years, not even on the trial, to amend their libels. They are still libels on contract. They are accordingly in no position, regardless of the merits of their claims, to attack the decision of the lower Court.

Reply to Petitioners' Brief.

In their statement of facts at page 4 and, in fact, throughout their brief, the petitioners refer to Jose Benjumea of Seville, Spain, as the agent of the steamship Isla de Panay. *Benjumea was not the agent of the Isla de Panay but the agent of the Compania Trasatlantica at Seville. Seville was not even a port of call for this vessel. She was a mail steamer, in addition to being a freight carrier, and stopped only at ports on the direct route between Barcelona and New York.* The Compania Trasatlantica maintains passenger and freight services throughout a large part of the world. If its agent at Seville could properly be called the agent of the Isla de Panay, it would follow that its representatives in Buenos Aires and Manila would also be the agents of the Isla de

Panay, whether the ship ran to those ports or not. This is plainly absurd. The appointment of a certain person as the representative of the Compania Trasatlantica at Seville did not *ipso facto* constitute him the agent of all of that company's vessels, in whatever trade engaged.

On page 6 reference is made to certain testimony of Captain Muslera of the Isla de Panay as to why the letters of guaranty were given in Seville. This testimony was given by the captain on redirect examination. It will be recalled that he was not present in Seville on the occasion in question and had never even seen the guaranties until they were shown to him on the taking of his deposition. Captain Muslera was clearly incompetent to give any testimony as to what Spanish banking houses would or would not do with regard to these bills of lading. He had been going to sea since 1888, had had his master's license since 1891, and had been in the employ of the Compania Trasatlantica since 1896 (p. 73, fol. 141). He knew nothing whatever concerning the delivery of these bills of lading in exchange for the letters of guaranty at Seville (pp. 141, 142, fols. 254-256, pp. 148, 149, fols. 266-269).

The petitioners never offered the testimony of any witnesses familiar with the customs of banking or insurance companies of Spain to show what was the custom there with respect to accepting bills of lading with no notations on them. Captain Muslera was exclusively a sea-faring man.

The fact that the testimony was brought out on re-direct examination does not make it competent.

In *Marine National Bank* v. *National City Bank*, 59 N. Y., 67, the New York Court of Appeals, on

a motion for a reargument of an appeal involving banking custom with regard to certification of checks, stated at page 73:

> "The affidavits upon which the motion in this instance is founded, and the statements put forth in them are not competent on this motion, and would not be competent as evidence for any purpose in any stage of the action. They are entitled to great respect by reason of the character and standing of the affiants, the distinguished positions they occupy, and their eminent fitness by reason of their great intelligence, and long and large experiences, to speak upon the subject of commercial usages, and moneyed transactions. Usage and custom properly proved can impress upon words and phrases a peculiar or technical meaning, and control the interpretation and effect of commercial contracts, but such custom and usage must be proved and determined, as a question of fact, upon the trial, and proof of them cannot be received by an appellate tribunal, having only jurisdiction of questions of law, either in support or impeachment of a judgment. But an insurmountable objection to the evidence now offered in any stage of the action, would be that neither of the eminent gentlemen whose affidavits are presented, profess to have any knowledge of any custom or usage, either general or particular, by which any meaning or interpretation has been given to the words used in the certifying of checks by the bank upon which they are drawn or effect to the act of certification other

> than that which the language used in its ordinary and popular sense would imply. There is no pretence that the enlarged liability now sought to be fixed upon a bank certifying a check, has ever been recognized, acknowledged, or acted upon. No such practical interpretation has ever been put upon a certification as is now insisted upon. General usage, and not individual opinions, make a custom that can control in the interpretation of contracts."

On pages 6 and 7 it is said that the bills of lading were not signed by the captain of the Mogador as was found by the lower Court, but by the agent at Seville. We insist nevertheless, that the bills of lading were in fact those of the captain of the Mogador, even though the captain's name was affixed thereto by the company's agent with a rubber stamp. Captain Pastrana testified with reference to these bills of lading as follows (p. 152, fol. 277):

> "The signatures on claimant's exhibits numbers 2, 3 and 4 shown to me by the commissioner are those of the rubber stamp bearing my name and I acknowledge them to be mine."

On page 7 it is asserted that Benjumea, the agent at Seville, testified that he was authorized to sign bills of lading as agent for the captain of the Isla de Panay. This is a distortion of his testimony. What he said was as follows (p. 211, fols. 417, 418):

> "The only importance attached to this procedure is the bills of lading having been signed

by the Captain of the Mogador instead of by the Captain of the Isla de Panay *or myself as agent* due to the latter's absence." (Italics ours.)

The remark on page 11 of the petitioners' brief that the captain and the second officer of the vessel noted the condition of the casks on the shipping orders, but failed to note it on the bills of lading, is very misleading. Neither the captain nor any of the officers of the Isla de Panay saw these bills of lading at Cadiz. They were through bills of lading from Seville.

Again on page 11, it is stated that no demand was made at New York that new hoops be substituted for the rusty ones which would fall off on being touched. Why should the ship's officers request the cargo owners to repair their own casks at New York? The petitioners' surveyors had inspected the cargo and they had their own coopers on the dock who were perfectly capable of making any necessary repairs to the casks.

On page 12 the ship's carpenter is referred to as being incompetent to replace the hoops which fell off the casks as they were being taken aboard the Isla de Panay at Cadiz. Chief officer Corvera simply said that the carpenter was not a cooper and did not undertake to replace hoops missing from casks (p. 115, fols. 210, 211). Furthermore, where would the new hoops come from? Was the ship obliged to carry a supply of hoops for this purpose? Most decidedly it was not.

On page 13 the petitioners say that the lower Court expressed the opinion that the ship owner might be liable in personam, although the ship was not liable in rem. This statement is not true. The

Circuit Court of Appeals expressly declined to pass upon the liability of the claimant-respondent. If any inferences are to be drawn from the opinion they are that the Court considered that the ship owner itself was not liable.

On page 14 the petitioners refer to our previous statement that the casks were actually in apparent good order when shipped on the Mogador at Seville. They seem unable to see any distinction between an old package and a damaged package. A container may be old and yet apparently be in good order. We repeat that the petitioners' casks were not received by the Mogador in a damaged condition, as they had been previously thoroughly recoopered. The company's agent himself testified that although the casks were very old and consequently appeared weak, they were not broken (p. 209, fol. 414, p. 213, fol. 423).

It is further said on page 14 that it is immaterial whether the casks were in apparent good order and condition at Seville or not, because they were leaking when received by the Isla de Panay at Cadiz, at about which time the bills of lading were delivered to the shippers at Seville. We fail to see the connection between the transhipment at Cadiz, and the delivery of the bills of lading in Seville. The bills of lading, which were dated on or about October 27, 1917, were delivered about November 5, 1917, at which time the cargo had left Seville. The local agent then had nothing further to do with it and of course did not know that the hoops of some of the casks dropped off when they were being taken aboard the Isla de Panay at Cadiz.

The petitioners, on pages 17 and 18 of their brief, in discussing the testimony of the ship's witnesses at Seville relating to the condition of the casks

there, lay emphasis on the statements of the witnesses that the casks were in "bad condition." It is evident that what the witnesses had in mind was the age of the casks and their consequent insufficiency as containers for olives, for the witnesses at the same time said that the casks had been recoopered on the quay, and thus put in condition for shipment.

On page 18 the petitioners say that the claimant-respondent's witness Garcia made objections as to the condition of the casks to the agent of the Isla de Panay. This is also incorrect. The witness merely said that he objected to the agent (p. 190, fol. 367).

On page 19 the petitioners assert that the lower Courts found that the petitioners had been defrauded. The lower Courts on the contrary made no such finding. This same misstatement is made under the heading of Point I (p. 20).

On pages 21 and 22 the petitioners endeavor desperately to make it appear that the ship was directly concerned with the issuance of the bills of lading and the taking of the guaranties. Inasmuch as the record shows the facts to be quite to the contrary we shall not answer the statements appearing on these pages further than to repeat that the master of the Isla de Panay never saw the bills of lading until they were shown to him at New York and that the vessel was at sea when the casks were being loaded aboard the Mogador at Seville.

On page 30 the petitioners cite the case of *H. Scherer & Co.* v. *Everest*, 168 Fed., 822, and on page 31 the case of *The Tampico*, 270 Fed., 537, on the question of estoppel. The first mentioned case deals with negotiable instruments and therefore has

no application to the instant cases. The second case is likewise not in point as it involves express representations concerning the terms of a charter party. Moreover, as regards the function of an estoppel, this Court, through Mr. Justice Swayne, stated in *Dickerson* v. *Colgrove*, 100 U. S., 578, as follows, at page 580:

> "*It is available only for protection, and cannot be used as a weapon of assault.*" (Italics ours.)

That is precisely the use which the petitioners herein are seeking to make of the alleged estoppel. They wish to use it as a sword.

The petitioners' argument on pages 33 and 34, divided into four points, is based entirely on a false premise, namely, that the person who issued the bills of lading on behalf of the captain of the Mogador and delivered them to the shippers in exchange for letters of guaranty, was the agent of the Isla de Panay. He was not the agent of the ship in any sense of the word.

On pages 35-37 appear numerous excerpts from Williston on Contracts, wihch are cited in support of the petitioners' contention that an estoppel arose against the Isla de Panay because of the omission of any reference in the bills of lading to the suspected insufficiency of the casks. On the contrary it has always been the law, as stated by the lower Court, that a bill of lading, being an instrument of a dual nature, a receipt and a contract at the same time, may be explained, modified and even contradicted insofar as the acknowledgment of receipt refers to the character, quality, quantity or condition of the goods.

Mr. Justice Clifford, speaking for this Court, in *The Delaware*, 14 Wall., 579, said at page 600:

> "Different definitions of the commercial instrument, called the bill of lading, have been given by different courts and jurists, but the correct one appears to be that it is a written acknowledgment, signed by the master, that he has received the goods therein described from the shipper, to be transported on the terms therein expressed, to the described place of destination, and there to be delivered to the consignee or parties therein designated."

And again at page 601:

> "Beyond all doubt a bill of lading, in the usual form, is a receipt for the quantity of goods shipped and a promise to transport and deliver the same as therein stipulated. Receipts may be either a mere acknowledgment of payment or delivery, or they may also contain a contract to do something in relation to the thing delivered. In the former case, and so far as the receipt goes only to acknowledge payment or delivery, it, the receipt, is merely *prima facie* evidence of the fact, and not conclusive, and therefore the fact which it recites may be contradicted by oral testimony, but in so far as it is evidence of a contract between the parties it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol evidence. Text writers mention the bill of lading as an example of an instrument which partakes of a twofold character, and such commentators

> agree that the instrument may, as between the carrier and the shipper, be contradicted and explained in its recital that the goods were in good order and well conditioned, by showing that their internal state and condition was bad or not such as is represented in the instrument, and in like manner, in respect to any other fact which it erroneously recites, but in all other respects it is to be treated like other written contracts."

In *Argo Steamship Co.* v. *Scago, et al.*, 101 Fed., 999 (C. C. A., Fifth Circuit), Judge Pardee, in considering a case where sugars received under a bill of lading, acknowledging their receipt in apparent good order and condition, were delivered in damaged condition, stated at page 1,000 as follows:

> "The libellants having alleged and proved that the sugars were delivered in a damaged condition, and as the bill of lading recited that the sugars were received in apparent good order and condition, and the carrier's contract was to deliver in like good order and condition, the burden of proof was on the claimant to show, either that the goods were not in good order when received by the ship (see Nelson v. Woodruff, 1 Black, 156, 160, 17 L. Ed., 97), or that they were damaged while in transit through one of the perils excepted in the contract."

This case was cited with approval in *The Aki Maru*, 255 Fed., 721 (C. C. A., 9th Circ.).

On page 37 the petitioners incorrectly state that the Circuit Court of Appeals for the Second Cir-

cuit was composed of different Judges from those deciding the instant cases, when it rendered its decision in *Higgins, et al.* v. *Anglo Algerian S. S. Co. Limited, supra.* Judge Rogers who wrote the opinion herein, and Judge Mayer who concurred therein, both participated in the Anglo-Algerian decision.

On page 40 the petitioners refer to the case of *Crawford & Law v. Allan Line S. S. Co. Ltd.* (1912), A. C., 130, on the subject of estoppel. This case was cited by the Circuit Court of Appeals in its decision in the Anglo-Algerian case. The bill of lading there acknowledged the receipt of the flour "in apparent good order, except as noted." The Court found that the carrier had not established that the goods had been damaged before being received. Lord Gorell said at page 143:

> "And I think it would be for the respondents, if they could, to show that the damage complained of was in fact done before they received the goods. The Lord Ordinary found that they had not discharged the onus of proving this."

The Circuit Court of Appeals also cited in the Anglo-Algerian case the English decisions of *Compania Naviera Vasconzada* v. *Churchill & Sim*, 1906, 1 K. B., page 237, and *Martineau, Ltd.* v. *Royal Mail Steam Packet Co.*, 12 Asp. M. C., 190; 17 Com. Cas., 176 (referred to on p. 39 of petitioners' brief). In the former case the bills of lading contained the clause "shipped in good order and condition" and in the latter case the acknowledgment of receipt stated that the merchandise was in apparent good order and condition.

The English courts in reaching their decisions have no doubt been influenced by the fact that an English statute (18 and 19 Vict. c. 111, §3), provides that bills of lading in the hands of consignees or endorsees for valuable consideration, which acknowledge the receipt of goods on a vessel, shall be conclusive evidence of the shipment as against the master or other person signing the bill of lading. This statute was referred to by Mr. Justice White in *Missouri Pac. Ry. Co.* v. *McFadden, et al.,* 14 Sup. Ct. Rep., 990, at page 992.

The case of *National Bank* v. *Kershaw Oil Mill,* 202 Fed., 90, cited at page 40 of petitioners' brief, is not in point, as it was an action at common law for deceit, not against the carrier, but against the oil mill, which procured a bill of lading from the carrier designating certain merchandise as cotton, whereas it was technically known as "linters." Furthermore, the decision appears to be opposed in principle to that of *St. Louis I. M. & S. Ry. Co.* v. *Knight, et al.,* cited *supra,* page 35 of our brief. The petitioners also cite at page 40 the case of *Nelson* v. *Woodruff,* 1 Black (66 U. S.), 156. There the bills of lading recited that the merchandise, namely lard, was in good order and condition when shipped and the case simply involved the question as to whether or not there was any inherent vice in the lard.

On pages 41-43, the petitioners invoke the rule that "where one of two innocent parties must suffer by the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequence." How this rule applies to the Isla de Panay is beyond our perception. Her master did not appoint the agent at Seville.

The cases of *The David & Caroline,* 5 Blatchford, 266 and *Hannibal Railroad* v. *Swift,* 12 Wall., 262 (79 U. S., 262), cited at page 44 of the petitioners' brief, are not applicable. Both were decided years previous to the passage of the Harter Act, and the Swift case, furthermore, refers to the transportation of the property of a passenger by a rail carrier. Moreover, Captain Pastrana of the Mogador, although under no obligation to do so since the passage of the Harter Act, we submit, did in fact require the recoopering and reconditioning of the petitioners' casks before he would allow them to be shipped on the Mogador (pp. 158, 159, fols. 289-293).

The cases cited by the petitioners on pages 46 and 47 are all State court cases, except that of *The David & Caroline,* which we have already discussed, and are obviously opposed to the decisions of the Federal courts in *The Konigin Luise, The Korunna* and *The Orion, supra.*

On page 47 is an assertion that "the facts in the present case show also that a clean bill of lading imports shipment 'in apparent good order and condition' (opinion Circuit Court of Appeals, etc.)." We find no justification for this statement, in the lower Court's opinion.

The case of *Hansen* v. *American Trading Co.,* 208 Fed., 884, cited at page 52, has no application whatever. There was a dispute there between the charterer and the master of the bark Loch Rannoch as to the form of bill of lading to be signed by the captain. This controversy delayed the schooner. The Court found that both parties were at fault. The master was held not entitled to demurrage and disbursements, and the charterer's

libel against the bark for undertaking to sail without furnishing a proper bill of lading was dismissed.

On pages 54-56 the petitioners ask this Court to disregard the fundamental admiralty principle that where cargo damage comes within the exemptions of a carrier's bill of lading, the burden of proof then shifts to the cargo owner to prove negligence in the stowage or handling of his merchandise. It is unnecessary for us to do more than merely state the petitioners' proposition. It calls for no reply whatever.

At this point we might incidentally allude to the provision of the Harter Act allowing exemption to a carrier where the loss is the result of an act or omission of the shipper of the goods. The furnishing of old and insufficient containers would surely be included within that exemption.

On pages 58 and 59 the remark is again made that the lower Court suggested that the petitioners had a cause of action in fraud against the Compania Trasatlantica. We emphatically dissent from this assertion.

On page 59 the case of *Dupont* v. *Vance*, 19 Howard, 162, is cited for the proposition that the form of action is immaterial in admiralty provided only that the facts show a cause of action in favor of the libellant. It would be going a great way, we submit, to hold that a libellant, who had founded his action on contract, as here, could recover in tort. On the contrary, the admiralty practice is that an amendment of the libel, whereby the cause of action is changed, will not be permitted on the trial, after a large amount of testimony has been taken on the original issues.

See:

The Burma, 187 Fed., 94 (C. C. A., Second Circuit);
The Ask, 156 Fed., 678 (S. D., N. Y.).

On page 59 it is said that the letters of guaranty were offered in evidence by the ship. This is not true. They were simply marked for identification (p. 148, fol. 266).

The petitioners on page 63 cite the case of *Bulkley* v. *Naumkeag Steam Cotton Company*, 24 Howard, 386, and lay great stress on it. The case, however, is totally different from the instant ones. There the master of the barque engaged and paid the lighter man. The lighter had transported 100 bales of cotton down to the barque, but before they were laden aboard the barque the lighter's boiler exploded and most of the bales were lost. The master of the barque had signed bills of lading for all of the 100 bales. It was held that the barque was liable in rem. We have already pointed out in detail the facts showing that neither the Isla de Panay nor her master or officers had anything whatever to do with the issuance of the bills of lading or the employment of the S.S. Mogador. When the Isla de Panay arrived at Cadiz the merchandise was transshipped directly aboard her from the Mogador, without any previous intervention on the part of her master. The cases cited by the petitioners on page 66 as following the case of *Bulkley* v. *Naumkeag Steam Cotton Company, supra,* in no way resemble the cases at bar.

If there is a case which bears any resemblance to the instant ones it is that of *Guffey* v. *Alaska & P. S. S. Co.*, 130 Fed., 271 (C. C. A., 9th Circ.). There the Alaska & Pacific

Steamship Company, which was operating the steamer Robert Dollar, received upon its dock at Seattle certain freight to be shipped to Nome, Alaska, and issued therefor its bill of lading. The bill of lading did not mention the vessel on which the goods were to be shipped, but it recited that they were shipped on board the company's steamer then lying at the port of Seattle and bound for Nome City. It was understood between the parties, however, that the Robert Dollar was the steamer which was to carry the goods. When the goods were received the steamer was about due in Seattle from Nome. She was delayed and did not arrive at Seattle until it was too late to make another trip to Nome during that season. The cargo was never loaded on the vessel. The cargo owner libelled the ship in rem for damages for breach of contract. The trial court held that there was no lien because the goods had never been placed on board the ship or in the custody of her master, and dismissed the libel. The Circuit Court of Appeals affirmed the decision and said at page 273:

> "We think that the court committed no error in holding that under the general maritime law the contract of affreightment created no lien upon the vessel. In 1, Parsons on Shipping & Admiralty, 183, it is said:
>
> > 'The receipt of the goods by the master on board of the ship, or at a wharf or quay *near the ship*, for the purpose of carriage therein, or by any person authorized by the owner or master so to receive them, or seeming to have this authority by the action or assent of the owners or master, binds the ship to the safe carriage and delivery of the goods.' (Italics ours.)

The delivery in the present case responds to all the requirements of this proposition of the textwriter, except that the goods were not delivered in the presence of or near the ship. The ship at that time, the appellant well knew, was either at Nome or on the high seas. The recital in the bill of lading that the goods were shipped on board the Alaska & Pacific Steamship Company's vessel or vessels employed or operated by them, 'and now lying at the port of Seattle,' does not have the effect to contradict the known facts. * * * Coupled with the known facts, the bill of lading was, in effect, a receipt by the steamship company of the goods on their wharf, for which freight had been paid, and an obligation to ship them on the Robert Dollar on her next trip. *The lien imposed upon a vessel on her contract of affreightment and delivery of the goods to the vessel is stricti juris, and cannot be extended by analogy or by inference.* * * * There is no case holding that the owner or agent of a vessel can, by a mere contract of affreightment made at her port while the vessel was on the high seas, thereby subject her to a lien." (Italics ours.)

The Court referred to the case of *The Keokuk* v. *Robson*, 9 Wall., 517, where this Court said that a ship owner is not liable if the party to whom the bill of lading was given had no goods, or the goods described in the bill of lading were never put on board, or delivered into the custody of the carrier or his agent, and said with reference thereto at page 275:

"In this dictum of the court it is implied

that a good delivery may be made not only to the master, but to the carrier or his agent; but, in view of other utterances of the court, we have no reason to think the language so used was intended to be understood as saying that a mere delivery to the carrier or his agent, evidenced by a bill of lading, would, in the absence of the vessel, and in the absence of knowledge on the part of her master or officers of such delivery, be a constructive delivery to the ship, such as to bind her to the safe carriage of the goods."

On page 66 reference is made to the case of *Osaka Shosen Kaisha* v. *Pacific Export Lumber Co.*, (*The Saigon Maru*), 260 U. S., 490. That decision strongly supports the principle for which we are contending. It was held that the ship was not subject to a lien for damages for the breach of a contract of affreightment merely because of the acceptance of part of the designated cargo.

Mr. Justice McReynolds, delivering the opinion of this Court, said at page 499:

"The maritime privilege or lien, though adhering to the vessel, is a secret one which may operate to the prejudice of general creditors and purchasers without notice and is therefore *stricti juris* and cannot be extended by construction, analogy or inference. *The Yankee Blade, supra.* The contract of affreightment itself creates no lien, and this Court has consistently declared that the obligation between ship and cargo is mutual and reciprocal and does not attach until the cargo is on board or in the master's custody. We think the lien

created by the law must be mutual and reciprocal; the lien of the cargo owner upon the ship is limited by the corresponding and reciprocal rights of the ship owner upon the cargo. See *The Thomas P. Sheldon,* 113 Fed., 779, 782, 783."

The petitioners, by the way, have continually referred to the SS. Mogador as a "lighter." She was not a lighter at all but a river steamer. She could not even be correctly designated as a steam lighter.

On page 67 it is pointed out that the lower Court, in reaching its conclusion that the Isla de Panay was not liable in rem, did so of its own volition, without suggestion by counsel for either side. The significance of this circumstance is not apparent to us. Surely the Court was within its rights in deciding the cases on a point not raised in the briefs of counsel.

On pages 70 and 71 the petitioners cite the case of *The City of Alexandria,* 28 Fed., 202, in support of the proposition that a ship may be liable in rem for the act of an agent. That case, however, was distinguished by the Circuit Court of Appeals for the Ninth Circuit from a case like that of *Guffey* v. *Alaska & P. S. S. Co., supra.*

With respect to the cases cited on pages 71 and 72, referring to the rule that a ship owner is estopped from denying the agency of the person signing its bills of lading where it has relied on exceptions therein, we may reply that the Compania Trasatlantica makes no denial that Jose Benjumea was its agent at Seville.

On page 76 further allusion is made to the *Bulkley* case and it is said that the only difference between that case and these is that here the bills of lading were signed by an agent of the company in

stead of by the master of the ship. That is not the only difference by any means between the cases, but if it were, it would constitute a sufficient reason, we respectfully submit, for this Court's declining to follow that decision.

On page 78 it is said that the present decision is irreconcilable with that of the same Court in the case of *The Minnetonka*, 146 Fed., 509, where the libellant had underestimated the amount of her damages and the Court assessed the excess amount over the stipulation for value against the claimant of the ship. Here again we beg to differ with the petitioners. There was no question there as to a change in the cause of action. The libellant had simply not placed the amount of her damages high enough. Furthermore the libellant moved to amend her libel to change the amount demanded to the sum proved. This motion was granted and the District Court entered a decree for the difference against the ship owner. Here, as we have already shown, the petitioners proceeded to trial on libels drawn in contract, and after the trial and on the argument endeavored to hold the ship on the theory of fraud without even asking for an amendment of their libels. They could not, of course, have amended them in the Circuit Court of Appeals. It would be absolutely contrary to the rules of admiralty practice to order a decree in personam against a ship owner appearing merely as claimant of the vessel, on a different cause of action from that alleged in the libels. (The cause of action which the petitioners are now relying on, as we have previously shown, is outside of the admiralty jurisdiction, in any event.)

The Southwark, 129 Fed., 171, cited on page 80, is of no value so far as the issues herein are concerned, and will therefore be disregarded.

POINT V.

The decrees of the lower Court should be affirmed.

Dated, New York, January 15, 1925.

Respectfully submitted,

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HUNT, HILL & BETTS,
Proctors for Claimant-Respondent.